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CONTROL OF EXPLOITATION OF NATURAL RESOURCES IN THE SEA OFF THE UNITED KINGDOM

At a time when new proclamations relating to the continental shelf and conservation zones for fisheries abound it may be worth while to consider existing United Kingdom legislation on these important questions. The United Kingdom has not in recent years enacted any legislation with regard to the continental shelf off its own coasts although it has made Orders-in-Council with regard to the sea-bed off the coasts of Trinidad and Tobago,[1] the Bahamas,[2] Jamaica,[3] British Honduras,[4] and the Falkland Islands.[5] Similarly, proclamations relating to the sea-bed off their coasts have been made by the Rulers of those States in the Persian Gulf which are under the protection of His Majesty's Government.[6]

If, however, no specific legislation, along the pattern of the recent Orders-in-Council made in respect of certain colonial territories and of the proclamations of the Persian Gulf States, has yet been enacted for the sea-bed off the coasts of the United

[1] The submarine areas of the Gulf of Paria (Annexation) Order, 1942, S.R. & O. 1942, Vol. 1, p. 919. This Order was made in consequence of the Treaty between the United Kingdom and Venezuela relating to Submarine Areas of the Gulf of Paria, which was signed in Caracas on February 26, 1942 (Treaty Series No. 10 (1942), Cmd. 6400).

[2] Bahamas (Alteration of Boundaries) Order, 1948, SI No. 2574.

[3] Jamaica (Alteration of Boundaries) Order, 1948, SI No. 2575.

[4] British Honduras (Alteration of Boundaries) Order, 1950, SI No. 1649.

[5] Falkland Islands (Continental Shelf) Order, 1950, SI No. 2100.

[6] *E.g.*, by Bahrain on June 5, 1949; by Qatar on June 8, 1949; by Abu Dhabi on June 10, 1949; by Kuwait on June 12, 1949; by Dubai on June 14, 1949; by Sharjah on June 16, 1949; by Ras al Khaimah on June 17, 1949; by Ummal Qaiwain and by Azman on June 20, 1949.

Kingdom, this does not mean that there are no principles of municipal law of any kind applicable to such submarine areas.

The United Kingdom, like other States, claims a maritime belt of territorial waters around all its coasts. In accordance with the recommendations of the Second Committee at The Hague Conference for the Codification of International Law (1930), which His Majesty's Government consider to be the most authoritative statement of international law on the subject, the United Kingdom is entitled to sovereignty over this belt as well as over the air space above it, and the sea-bed and subsoil below it.[7] The extent of the territorial sea claimed by His Majesty's Government is three sea miles,[8] and, subject to certain special provisions regarding bays and islands, ' the breadth of the territorial sea is measured from the line of low-water mark along the entire coast '.[9] It is often thought that the claim of His Majesty's Government to a territorial sea of three sea miles rests on the Territorial Waters Jurisdiction Act, 1878.[10] This, however, is not the case. The Act was passed after the decision of the Court of Crown Cases Reserved in *Regina* v. *Keyn*,[11] in which it was held that English courts had no jurisdiction to deal with criminal offences in territorial waters. The purpose of the Act was to confer on the courts such a jurisdiction.

Section 7 of the Act reads as follows:

' The territorial waters of Her Majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions '.

[7] See Articles 1 and 2 of Appendix 1 to the Report of the Second Committee (*Acts of the Conference*, pp. 212–3).

[8] A sea mile is the length of one minute of arc measured along the meridian in the latitude of the place (or vessel) and it varies with the latitude and the dimensions adopted for the circumference of the earth (*e.g.*, the variation due to the shape of the earth in one length of one sea mile between latitudes 60 deg. and 70 deg. is a matter of 8 feet. Thus, the length of a sea mile in latitude 60 deg. is approximately 6092.4 feet and in latitude 70 deg. 6100.8 feet. The sea mile is the general unit of measurement used by British seamen and is the measurement most easily taken from any chart. It is not to be confused with a nautical mile. The latter is a measured distance used for calculating speeds and varies in different countries. The British nautical mile is 6080 feet. The term ' three sea miles ' is also preferable to the expression ' one marine league '. The latter is an outmoded term which was formerly understood to mean ' a measure of length of three nautical miles '.

[9] See Appendix 2 to the above Report, namely the Report of the Second Sub-Committee (*ibid.*, p. 217).

[10] 41 & 42 Vict. c. 73.

[11] (1876) L.R.Ex.D. 63.

Thus, it is only for purposes of the exercise of criminal jurisdiction that the three-mile limit depends on this statute.[12] As section 7 itself says, British territorial waters in general mean ' such part of the sea adjacent to the coast of the United Kingdom . . . as is deemed by international law to be within the territorial sovereignty of Her Majesty '. If, therefore, international law were to allow a six-mile or even a twelve-mile limit, no amendment would be needed to the Territorial Waters Jurisdiction Act to enable His Majesty's Government to claim the new distance, except with regard to the single matter of criminal jurisdiction.

His Majesty's Government's claim to a territorial sea of three sea miles rests, therefore, on the understanding that this is the breadth prescribed by international law. With regard to the sea-bed and the subsoil beneath the territorial sea, there is equally no general statutory enactment to the effect that these areas are within the dominions of the Crown. Nor has there ever been a judicial pronouncement to this effect. It is, however, settled doctrine that the Crown is the owner of the foreshore itself; *i.e.*, that part of the shore which lies between high and low-water mark.[13] It has also been held by the House of Lords, in *Lord Advocate* v. *Wemyss* [14] that at any rate ' by the law of Scotland, the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested in the Crown '. This dictum was approved by the Judicial Committee of the Privy Council in *Secretary of State for India* v. *Chellikani Ramo Rao.*[15] There is, therefore, strong persuasive authority for holding that in English law the Crown is the owner of the sea-bed and the subsoil, and of all minerals therein, between the high-water mark and the outer limit of the territorial sea, however far out that may be.[16]

[12] Referring to the Territorial Waters Jurisdiction Act, 1878, in a debate in the House of Lords, in 1895, the Lord Chancellor, Lord Herschell, said that those responsible for drafting the Act ' took care to specially avoid any measurements. The distance was left at such limit as was necessary for the defence of the Realm. Then the exact limit was given for the particular purpose in view '. (*Hansard*, 4th Series, vol. 33, p. 504).

[13] Hale, *De Jure Maris*, Hargrave, *Law Tracts*, p. 14. By prerogative right the Crown is the prima facie owner of the foreshore. The burden of proof to the contrary is on the claimant. (*Attorney-General* v. *Richards* (1795) 2 Anst. 603; 44 Digest 71, 519.) In Cornwall, however, the foreshore belongs prima facie to the Duke of Cornwall, by virtue of a parliamentary grant to the Black Prince. See Halsbury, *Laws of England*, 2nd ed., Vol. vi, pp. 725–727.

[14] [1900] A.C. 48.

[15] [1916] 39 Indian Reports, Madras Series, 617.

[16] Except in Cornwall where, by virtue of the Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109), all minerals lying under the sea-shore between high and low-water mark and under estuaries and tidal rivers below low-water mark in the County of Cornwall are vested in the Prince of Wales ' as part of the soil and territorial possessions of the Duchy of Cornwall '. On the other hand minerals lying below low-water mark under the open sea adjacent to, but not

All lands belonging to the Sovereign in right of the Crown are placed under the management of the Commissioners of Crown Lands, who are empowered to lease any Crown land, or any easement, right or privilege thereover, for any term not exceeding 100 years.[17] In granting leases of the sea-bed and the subsoil the Commissioners of Crown Lands are guided by the following principles,

(i) Sites required for permanent substantial works such as reclamation, piers and jetties are leased at a rent assessed by the Chief Government Valuer.

(ii) Sites required for sea defence works or outfall sewers are made the subject of an easement or a licence at a nominal rent.

(iii) Licences for dredging materials such as sand, gravel or shingle from the sea-bed are granted at a rent of £1 per annum plus a royalty per ton assessed by the Chief Government Valuer.

(iv) Licences for the working of minerals other than coal in the subsoil beneath the sea-bed are granted at a rent and royalty per ton assessed by the Crown Minerals Adviser.

With regard to the exploitation of coal, however, all the Crown's proprietary interests in unworked coal vested in 1942 in the Coal Commission established by the Coal Act, 1938.[18] These rights were transferred to the National Coal Board under the Coal Industry Nationalisation Act, 1946.[19] Consequently the National Coal Board has an exclusive right to work the coal under the sea around the coasts of Great Britain. Furthermore, under the Petroleum (Production) Act, 1934, ' The property in petroleum existing in its natural conditions in strata in Great Britain is hereby vested in His Majesty, and His Majesty shall have the exclusive right of searching and boring for and getting such petroleum '.[20] The Act states, however, that ' The Board of Trade, on behalf of His Majesty, shall have power to grant to such persons as they think fit licences to search and bore for and get petroleum '.[21] These licences are controlled by the Petroleum (Production) Regulations, 1935.[22] Under

being part of the County of Cornwall, are vested in the Sovereign in right of the Crown ' as part of the soil and territorial possessions of the Crown '. (See Halsbury, *op. cit.*, pp. 877–8, Hurst, ' Whose is the Bed of the Sea? ', *British Year Book of International Law*, Vol. iv (1923–24), p. 34.)

17 Crown Lands Act, 1829, 10 Geo. 4, c. 50; Crown Lands Act, 1845, 8 & 9 Vict. c. 99; Crown Lands Act, 1866, 29 & 30 Vict. c. 62; Crown Lands Act, 1927, 17 & 18 Geo. 5, c. 23; Crown Lands Act, 1936, 26 Geo. 5 & 1 Edw. 8, c. 47; and Coast Protection Act, 1949, 12 & 13 Geo. 6, c. 74, sections 37–40.

18 1 & 2 Geo. 6, c. 52.

19 9 & 10 Geo. 6, c. 59.

20 24 & 25 Geo. 5, c. 36, s. 1.

21 Section 2.

22 S.R. & O. 1935, No. 426.

these provisions prospecting licences may be and have been given to cover submarine areas off the coast.

Although it is the recent legislation of many countries relating to the continental shelf that has aroused the chief interest among writers, there has been at least an equal amount of legislation on a subject which is of even greater immediate practical importance, namely fishery conservation. Some countries, whether of design or inadvertently, have combined legislation relating to the two subjects in the same proclamations.[23] According, however, to the International Law Commission the question of conserving the resources of the sea is ' quite distinct ' [24] from the problem of the continental shelf, and it can hardly be doubted that this is the correct view.

So far as fishing off the coasts of the United Kingdom is concerned, foreigners are under international law prohibited from fishing in territorial waters. As has been shown above, there is no statutory enactment to the effect that territorial waters necessarily are limited to three miles for any other purpose save that of criminal jurisdiction, but that distance is the distance provided for in Article IX of the Anglo-French Fishery Convention signed at Paris on August 2, 1839,[25] and in Article II of the North Sea Fisheries Convention signed at The Hague on May 6, 1882.[26] The purpose of

[23] *E.g.*, Proclamation by the President of the Republic of Chile, dated June 23, 1947; Decrees Nos. 116 of July 27, 1948, and 803 of November 2, 1949, by the Founding Junta of the Second Republic of Costa Rica; Decree No. 25 by the Congress of Honduras, dated January 17, 1951; Proclamation by the President of the United States of Mexico, dated October 29, 1945; Proclamation by the President of the Republic of Peru, dated August 1, 1947. On the other hand, on September 28, 1945, the President of the United States of America issued *two separate* Proclamations, one concerning ' Natural resources of the subsoil and sea-bed of the continental shelf ', the other concerning ' Jurisdiction over natural resources in coastal areas and the high seas '.

[24] Report of the International Law Commission, covering its third session: Annex: Draft Articles on the Continental Shelf and Related Subjects. (U.N.doc. A/CN.4/48, of July 30, 1951, at p. 60.)

[25] *Convention between Her Majesty and the King of the French, defining and regulating the Limits of the Exclusive Right of the Oyster and other Fishery on the Coasts of Great Britain and France.* (*British and Foreign State Papers*, referred to subsequently as *B.F.S.P.*, Vol. 27, p. 983.) Article IX stated, ' The subjects of Her Britannic Majesty shall enjoy the exclusive rights of fishery within the distance of three miles from low-water mark along the whole extent of the coasts of the British Islands. . . . It is equally agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland '. The benefits of this Convention were extended to Belgium, under the Anglo-Belgian Fishery Convention of 1852 (*B.F.S.P.* Vol. 41, p. 7) by virtue of a most-favoured-nation clause.

[26] *Convention between Great Britain, Belgium, Denmark, France, Germany and the Netherlands, for regulating the Police of the North Sea Fisheries* (*B.F.S.P.*, Vol. 73, p. 39), Article II stated:

' The fishermen of each country shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark along the whole extent of the coast of their respective countries, as well as of the dependent islands and banks. As regards bays, the distance of three miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at

these Conventions was not to define territorial waters, but to regulate the policing of the fisheries. However, in order that this purpose could be achieved, it was necessary at least to have a definition of exclusive fishery limits.[27] Statutory effect was given to these Conventions.[28] In particular the Sea Fisheries Act, 1883, extended the police regulations of the North Sea Fisheries Convention, so far as British sea-fishing boats were concerned, to all the seas around the British Islands,[29] whether within or without the exclusive fishery limits. For this purpose, the expression ' exclusive fishery limits of the British Islands ' was defined as ' that portion of the seas surrounding the British Islands within which Her Majesty's subjects have, by international law, the exclusive right of fishing, and where such portion is defined by the terms of any convention, treaty, or arrangement for the time being in force between Her Majesty and any Foreign State, includes, as regards the sea-fishing boats and officers and subjects of that State, the portion so defined '.[30] Thus, as a leading authority says, ' In the Convention Act, as in the Territorial Waters Jurisdiction Act,[31] we accordingly find a distinction drawn between the exclusive fishery limits under international law and those under specific treaties or conventions '.[32]

The position is indeed analogous. There is no more a general statutory definition of ' exclusive British fishery limits ' than there is of ' British territorial waters '; in both instances such statutory definitions as Parliament has thought fit to enact have been for specific purposes only.

In Scotland, in section 6 (1) of the Herring Fishery (Scotland) Act, 1889,[33] it was provided that ' it shall not be lawful to use the method of fishing known as beam trawling or otter trawling within

the first point where the width does not exceed ten miles '. Despite the phrase ' along the whole extent of the coasts of their respective countries ', the better view is that it is only the North Sea coasts of the countries concerned that are covered by the Convention (T. W. Fulton, *The Sovereignty of the Sea*, 1911, pp. 643–4. S. A. Riesenfeld, *Protection of Coastal Fisheries under International Law*, 1942, p. 152; C. B. V. Meyer, *The Extent of Jurisdiction in Coastal Waters*, 1937, p. 113). The limits of the North Sea were defined in Article IV of the Convention.

27 The British delegates at the conference at The Hague in 1882 had originally argued that ' il leur paraît que la question de la définition de ces limites n'est pas de la compétence de la Conférence '. (Martens, *Nouveau receuil général de traités*, 2nd series, Vol. 9, p. 531.)

28 *E.g.*, Sea Fisheries Act, 1843 (6 & 7 Vict. c. 79), and Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22).

29 The ' British Islands ' were defined as including ' the United Kingdom of Great Britain and Ireland, the Isle of Man, the Islands of Guernsey, Jersey, Alderney, and Sark, and their dependencies ' (section 28).

30 Section 28.

31 *Supra*, p. 446.

32 Fulton, *op. cit.*, p. 644.

33 52 & 53 Vict. c. 23.

three miles of low-water mark of any part of the coast of Scotland, nor within the waters specified in the schedule hereto annexed ', except in such areas as might from time to time be permitted by byelaws of the Fishery Board for Scotland, and subject to any conditions or regulations made by those byelaws.

This section was, however, to apply neither to the Solway Firth nor to the Pentland Firth. On the other hand, one of the areas mentioned in the annexed schedule was ' the waters inside a line drawn from Corsewall Point, in the county of Wigtown, to the Mull of Cantyre, in the county of Argyll ' (*i.e.*, the Firth of Clyde). Also, in section 7 (1) of the Act, the Fishery Board for Scotland was empowered to make byelaws prohibiting beam trawling and otter trawling ' within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire ',[34] Section 8 of the Act made it unlawful ' to land or sell in Scotland any fish caught in contravention of this Act '. Further, in section 10 (1) of the Sea Fisheries Regulation (Scotland) Act, 1895, the Fishery Board for Scotland was empowered to make byelaws prohibiting beam trawling and otter trawling ' in any area or areas under the jurisdiction of Her Majesty, within thirteen miles of the Scottish coast '. However, section 10 (3) of the same Act stated that ' no area of sea within the said limit of thirteen miles shall be deemed to be under the jurisdiction of Her Majesty for the purposes of this section unless the powers conferred thereby shall have been accepted as binding upon their own subjects with respect to such area by all the States signatories of the North Sea Convention, 1882 '.

This provision greatly limited the effectiveness of the powers granted under the first sub-section of section 10 of the Act, and in fact these powers have never been exercised.

[34] It was this provision which led to the well-known case of *Mortensen* v. *Peters* (1906) 8 S.C. 93. In this case it was held that Mortensen, the master of a Norwegian trawler, found fishing in the Moray Firth but outside the three-mile limit, had committed an offence under section 7 (1) of the Act. A fine was imposed. The British Government, while recognising that the Scottish courts were bound by the Act, also recognised that the Moray Firth was not a territorial bay and accordingly remitted the fine. To meet the difficulty inherent in any attempt to enforce the Act against foreigners, Parliament in 1909 passed another Act, namely the Trawling in Prohibited Areas Prevention Act (9 Edw. 7, c. 8). This made it an offence ' to land or sell in the United Kingdom any fish caught by the methods of fishing known as beam trawling and otter trawling within prohibited areas as defined in this Act '. The prohibited areas referred to included those provided for in the Herring Fishery (Scotland) Act, 1889. Moreover, section 4 of the Act of 1909 specifically stated that ' Nothing in this Act shall affect or derogate from the provisions of section eight of the Herring Fishery (Scotland) Act, 1889: Provided that, in any case where fish have been forfeited in pursuance of the provisions of this Act, proceedings shall not be taken for a penalty under that Act '. In fact the power contained in the Act of 1889 to prohibit trawling in the Firths of Clyde and Moray outside the three-mile limit has not been exercised since 1907.

In England and Wales the public have a common law right to fish in that part of the sea which lies between the exterior limit of territorial waters on the one hand and the interior limit of the foreshore (*i.e.*, the high-water mark) on the other hand, except where the Crown or some particular subject has gained a proprietary right exclusive of the public right or where Parliament has restricted the common law right of the public. Since the time of Magna Charta the public can only be deprived of their common law right by Act of Parliament. In Scotland, however, the public have no right to fish for salmon in this part of the sea, as this right is vested in the Crown, except where grants have been made to private persons by the Crown.

In England and Wales the Minister of Agriculture and Fisheries has power to grant a right of several (*i.e.*, private) oyster, mussel or cockle fishery above or below the low-water mark, but such a grant is subject to the discretion of Parliament in a case where an appeal against it is lodged by an interested party.

The right of several fishery is granted for a limited term only—a maximum of sixty years. The right is normally conferred only where it is likely to be of beneficial effect to the fishery or to the supply of shell-fish, and it may be withdrawn by the Minister if it proves detrimental to the fishery. These powers of the Minister rest on the Sea Fisheries Act, 1868,[35] as amended by the Sea Fisheries Act, 1884,[36] the powers granted under these Acts to the Board of Trade being transferred to the Ministry of Agriculture and Fisheries by the Board of Agriculture and Fisheries Act, 1903,[37] and the Ministry of Agriculture and Fisheries Act, 1919.[38] The Secretary of State for Scotland has similar powers, powers which were transferred to him from the Board of Trade by the Fishery Board (Scotland) Act, 1882,[39] and the Reorganisation of Offices (Scotland) Act, 1939.[40]

In addition to the powers mentioned above, which concern the actual ownership of a fishery, the same statutory provisions empower the Minister of Agriculture and Fisheries to grant to a public body, subject to the same considerations as for a several fishery, a right of regulating or restricting fishing in an oyster, mussel or cockle fishery. The Minister, when making such a grant,

[35] 31 & 32 Vict. c. 45, Part III.
[36] 47 & 48 Vict. c. 27, s. 1.
[37] 3 Edw. 7, c. 31, s. 1.
[38] 9 & 10 Geo. 5, c. 91.
[39] 45 & 46 Vict. c. 78.
[40] 2 & 3 Geo. 6, c. 20. This Act also transferred to the Secretary of State for Scotland the powers exercised by the Fishery Board for Scotland under the Herring Fishery (Scotland) Act, 1889, and the Sea Fisheries Regulation (Scotland) Act, 1895.

lays down the restrictions and regulations necessary for the protection of the fishery and the charges which may be made, in the form of tolls or royalties, for the taking of the shell-fish. These charges are collected by the grantees but are applied by them only to the improvement and cultivation of the fishery. Authority is also given by the Sea Fisheries Regulation Act, 1888,[41] as amended by the Fisheries Act, 1891,[42] and the Sea Fisheries (Shell Fish) Regulation Act, 1894,[43] to local Sea Fisheries Committees to make byelaws relating to the fisheries in their respective districts. These byelaws, which are subject to such regulations as may be made by the Minister, may restrict or prohibit, either absolutely or subject to such regulations as may be made by the byelaws, the use of various methods or instruments for the taking of fish (*e.g.*, size of mesh or form and dimensions of instrument) and the fishing for or taking of all or any specified kinds of sea fish during any specified period. Local Sea Fisheries Committees may also make byelaws relating to oyster and shell fisheries and for the prevention of pollution.[44]

No charge is made by the Minister of Agriculture and Fisheries for the grant of a right of several fishery, but the grantees are required to obtain the consent of the Commissioners of Crown lands before using or in any way interfering with any portion of the sea-bed belonging to the Crown. The Commissioners give their consent in the form of a lease for which a rent is payable. The amount of the rent varies according to whether the fishing is to be for profit or merely for experimental purposes.

D. H. N. Johnson.

41 51 & 52 Vict. c. 54.
42 54 & 55 Vict. c. 37, s. 7.
43 57 & 58 Vict. c. 26, s. 1.
44 In Scotland, the Sea Fisheries Regulation (Scotland) Act, 1895, 58 & 59 Vict. c. 42, provided for the constitution of Sea Fishery District Committees, similar to the Sea Fisheries Committees of England and Wales. These committees, however, have never functioned in Scotland.

PERSONAL STATUS AND RELIGIOUS LAW IN ISRAEL

I

THE Law and Administration Ordinance No. 1 of 1948 provides: ' The Law which existed in Palestine on the 5th Iyar 5708 (14th May 1948) shall remain in force, in so far as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities '.

The same Ordinance provides further : ' Any privilege granted by law to the British Crown, British Officials or British subjects is hereby declared to be null and void. Any provision in the law whereunder approval or consent of any of the Secretaries of State of the King of England is required or which imposes a duty to do anything in pursuance of his directions, is hereby declared null and void. Any power assigned by the law to judges, officers or members of the Police Force by reason of their being British, shall henceforth vest in judges, officers or members of the Police Force who are holders of the same office or rank in the State of Israel '.

Subject to these modifications the Palestine Order in Council remained in force. In accordance with the latter the jurisdiction in matters of personal status is being exercised by civil and religious courts respectively. Matters of personal status comprise suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibitions from dealing with property of persons who are legally incompetent, succession, wills and legacies, and the administration of property of absent persons. In regard to successions, the Succession Ordinance contains special provisions which are, however, subject to the provisions of the Palestine Order in Council.

Moslem religious courts have exclusive jurisdiction in matters of personal status of all Moslems who are Israeli citizens or foreigners who under the law of their nationality are subject in such matters to the jurisdiction of Moslem religious courts.

The rabbinical courts of the Jewish Community have exclusive jurisdiction in matters of marriage and divorce, alimony and confirmation of wills of members of their Community other than foreigners. A foreigner is any person who is not an Israeli citizen.

The rabbinical courts exercise jurisdiction in any other matters of personal status, where all the parties to the action consent to their jurisdiction. It has to be noted that this jurisdiction is a jurisdiction concurrent with that of the civil courts and it has been judicially decided that a minor cannot validly give his consent to the jurisdiction of a religious court.

The courts of the several Christian Communities have the same jurisdiction as rabbinical courts in regard to members of their Communities other than foreigners, and concurrent jurisdiction to the same extent as the rabbinical courts in regard to matters of personal status of members of their Communities other than foreigners. In this connection it has to be noted that not all the several Christian Communities are recognised as such by the Palestine Order in Council, but only the following: (1) The Eastern (Orthodox) Community; (2) The Latin (Catholic) Community; (3) The Gregorian Armenian Community; (4) The Armenian (Catholic) Community; (5) The Syrian (Catholic) Community; (6) The Chaldean (Uniate) Community; (7) The Greek (Catholic) Melkite Community; (8) The Maronite Community; (9) The Syrian (Orthodox) Community.

The Protestant Community, *e.g.*, is not recognised as a religious Community and has, therefore, no courts which are able to exercise any jurisdiction in matters of personal status.

Where any action of personal status involves persons of different religious Communities, application may be made by any party to the President of the Supreme Court (who in this respect appears to fulfil the functions accorded to the Chief Justice in the Palestine Order in Council), who shall, with the assistance, if he thinks fit, of assessors from the Communities concerned, decide which court shall have jurisdiction. Whenever a question arises as to whether or not a case is one of personal status within the exclusive jurisdiction of a religious court, the matter must be referred to a Special Tribunal for decision.

Matters of personal status affecting foreigners—other than Moslems in respect of whom Moslem religious courts have exclusive jurisdiction—must be decided by the District Courts which apply the personal law of the parties concerned. This provision has one important exception, namely, that the District Courts have no jurisdiction to pronounce a decree of dissolution of marriage. In consequence, there is no provision for divorce of foreigners in Israel. Vitta [1] suggests that jurisdiction to pronounce decrees of dissolution

[1] The leading textbooks on the subject are Dr. Vitta's *The Conflict of Laws in matters of Personal Status in Palestine*, Tel Aviv, 1947, and Dr. Goadby's *International and Interreligious Private Law in Palestine*, Jerusalem, 1926.

of marriages of foreigners has been denied to all courts in Palestine, now Israel, so as to prevent foreigners from evading the prohibitions of their national law. Vitta therefore suggests that the courts should at least be empowered to grant divorces to foreigners where such a divorce would be valid in accordance with their national law. There is, however, no foundation in the law of Israel for such an assumption, although it would be most desirable if the Israeli Legislature would empower the courts to pronounce divorces to foreigners at least in cases where this is in accordance with the national law of the parties. The only exception so far made by the courts has been the recognition of religious divorces in cases where the national law of the parties concerned would recognise such a divorce.[2]

It is evident that the part played by religious courts and religious law in Israel is considerable. It has already been pointed out that there is no civil divorce, and it has to be added that there is no civil marriage in Israel.[3] A divorce in accordance with Jewish religious law has not the meaning generally attached to the term ' divorce '. Whilst the divorce is in secular law based on a claim filed in court by one of the spouses alleging certain grounds which should entitle the claimant to demand and the court on proof to pronounce a judgment divorcing the spouses, in Jewish law the divorce is a contract solemnly entered into and confirmed by the religious court. Whilst secular laws in general do not grant a divorce if the demand for a divorce is based on the consent of the parties, the rabbinical court will not confirm a divorce unless both parties agree to the delivery and acceptance of the letter of divorce, the ' Get ', by husband and wife, respectively. There is no power vested in the rabbinical courts to force one of the spouses to give the letter of divorce or to accept the same, other than persuasion or religious penalties which often fail to be effective. Attempts have been made to force a reluctant husband to grant a divorce to his wife by imposing on him considerable amounts of alimony unless and until he agrees to the divorce. The validity of such a judgment of a rabbinical court is, however, doubtful.

Article 12 of the Succession Ordinance provides the possibility of making a will in civil form. This provision appeared to conflict with Articles 53 and 54 of the Palestine Order in Council in accordance

[2] See *Volkenberg* v. *Volkenberg*, C.A. 22/34 (2 P.L.R. 365; 8 R. 588; P.P. 31.7.35); *Walder* v. *Azgour*, C.A. 22/42 (9 P. L. R. 328; 1942 S.C.) 259; 12 Ct.L.R. 3); *Lipszyc* v. *Lipszyc*, C.A. 184/43 (10 P.L.R. 415; 1943 A.L.R. 449); *Silver* v. *Shekerka*, C.A. 71/44 (11 P.L.R. 381; 1944 A.L.R. 460). All these decisions were given at the time of the Mandate.

[3] Except as far as a consul may be competent to register the marriage of a subject of the State represented by the consul.

with which Jewish and Christian religious courts have exclusive jurisdiction in matters of confirmation of wills of members of their community other than foreigners.[4] The questions involved were reviewed again in *Samara* v. *Saadeh and Others*, C.A. 70/46 (1947 A.L.R. 91) where it was held that if the legislator had intended to provide a means of escape from the restrictions of the testator's personal law, he would have expressed his intentions in clear terms. The question whether probate of a will made in civil form by a Palestinian citizen, who is a member of a religious community, is within the jurisdiction of the District Court or the courts of his religious community, was referred to the decision of a Special Tribunal. In this connection it has to be noted that, in accordance with Jewish religious law, no will properly so called can be made by a member of the Jewish Community. Jewish law recognises a donatio mortis causa, a transfer of the testator's property by way of sale or gift ('Kinyan') as the only way of making testamentary dispositions. It is, therefore, evident that the rabbinical courts would not recognise the validity of a will in civil form made by an Israeli member of the Jewish community.

II

Since the rise of the State of Israel, the Supreme Court of Israel has given a number of decisions which decisively affect the application of law and procedure in matters of personal status.

Maintenance and Alimony: A judgment of far-reaching importance was given by the Supreme Court in C.A. 376/46.[5] Under the mandatory regime the courts of Palestine had adhered strictly to the different meanings given in English law to the expressions 'Maintenance' and 'Alimony' respectively. This distinction was of importance because in regard to suits for alimony the religious courts exercised exclusive jurisdiction, while no such exclusive jurisdiction existed in regard to suits for maintenance. The President of the Supreme Court held in the case just quoted that the expressions 'Alimony' and 'Maintenance', and all other definitions in matters of personal status, should be interpreted in accordance with the laws of the different religious communities concerned. The President quoted with approval Dr. Goadby's remarks[6] in regard to the meaning of 'Alimony' and 'Maintenance' in the Palestine Order in Council: 'Under the Palestine Order in Council (Art. 51) suits for alimony and maintenance are included among matters of personal

[4] *Raschkovitz and Another* v. *Silberstein*, C.A. 106/40 (6 P.L.R. 310), and see also *Kaplan* v. *Kaplan*, C.A. 131/42 (9 P.L.R. 752).
[5] Psakim, Vol. 2, 1949, p. 5 (The President Dr. Smoira, Assaf and Cheshin JJ.).
[6] *Loc. cit.*, p. 162.

status and are, therefore, governed by national or religious law. Alimony alone is mentioned in Articles 53 and 54 within the exclusive jurisdiction of non-Moslem Courts of Personal Status. This is in accordance with the Turkish practice under which the non-Moslem courts had jurisdiction in matters of alimony (payments by a husband for the support of his wife), but not as regards maintenance (payments by parents for the support of children, by children for parents or by other relatives inter se) '. It is evident that by the changed interpretation of the expression ' Alimony ' the exclusive jurisdiction of the religious courts was considerably extended.

The judgment contains two further important principles, the first being that the intention of the Palestine Order in Council was not to change the status quo, but to leave to the different secular and religious courts the competence which they exercised at the time of the Turkish regime.

Secondly, the Supreme Court held that it is not bound by a judgment given by the Mandatory Supreme Court if such judgment was based on a wrong interpretation of the law.

Custody Over Children: In H.C. 36/50 [7] it was held that suits for divorce and suits for the custody over children are both suits in rem, and that this is a general principle applying to all matters of personal status.

In the same decision it was held that a change of domicile after filing of the claim is of no importance, the decisive time being the date when the claim is filed and not when judgment is being given.

In H.C. 125/49 [8] it was held that whoever claims to be entitled to the custody of a child must obtain the judgment of a competent court, *i.e.*, of a District Court or a religious court, as the case may be.

After a parent has been awarded the custody of a child by the competent court, he or she is entitled to bring a petition for habeas corpus against the other parent acting in contravention of the judgment by which the custody was determined.

The rules accepted in England in regard to international private law are to be applied in the State of Israel, and in accordance with these rules a judgment pronouncing a divorce, and determining at the same time the custody over a child, is to be regarded as a judgment in rem.

In C.A. 85/47 [9] it was affirmed that if a claim for the custody of

[7] Psakim, Vol. 3, 1950–51, Parts 12–13, p. 356 (The President Dr. Smoira, Olshan and Agranat JJ.).
[8] Psakim, Vol. 3, 1950, Part 1, p. 15 (The President Dr. Smoira, Dunkelblum, Assaf, Cheshin and Agranat JJ.).
[9] Psakim, Vol. 2, 1949, p. 454 (The President Dr. Smoira, Assaf and Cheshin JJ.).

a child is part of a suit over which a certain court has exclusive jurisdiction, then the said court is also competent to decide on the custody of a child.

The same decision affirms the rule that it is possible for a person to be estopped by his conduct from denying that he belongs to a certain community, adding, however, that the celebration of a marriage as such, even if the same was arranged in accordance with the rites of a certain community, does not 'transfer' a person into the said community.

Maintenance of Grown-up Son: The Supreme Court dealt with this question in C.A. 211/47,[10] and confirmed that in accordance with Jewish law a father who is a man of means is bound to maintain his grown-up son, if the latter is in need, provided, however, that no such judgment can be given whilst the son is still a minor beyond the time when he ceases to be a minor.

Wife's Claim for Maintenance : In the decision just quoted it was further held that a wife who has left her husband has a claim for maintenance only if she can prove that she was justified in leaving him. The husband is, in accordance with Jewish law, entitled to command his wife to follow him from place to place, and if she should refuse to follow him without good reason for such refusal, she loses her claim for maintenance. The judgment contains an obiter dictum to the effect that it is doubtful whether a secular court is entitled to declare a wife rebellious, even if such a finding should be incidental to a claim for maintenance.

Limits of Jurisdiction : In H.C. 8/48 [11] the duty of the religious court was emphasised to examine carefully its competence, wherever the religious court was called upon to give a decision in a matter not within its exclusive jurisdiction, to wit: whether all parties concerned had validly consented to its jurisdiction.

In C.A. 51/49 [12] it was held that Article 47 of the Palestine Order in Council (as to jurisdiction of matters of personal status) was not designed to limit the orbit of Article 46 (law to be applied), but on the contrary, to enlarge the latter's scope.

In C.A. 16/49 [13] it was held that the definition in Article 51 of the Palestine Order in Council on matters of personal status does not include claims filed by a third party against one of the spouses.

[10] Psakim, Vol. 2, 1949, p. 114 (Dunkelblum, Agranat and Assaf JJ.).
[11] Psakim, Vol. 1, 1948–9, p. 210 (The President Dr. Smoira, Olshan and Assaf JJ.).
[12] Psakim, Vol. 3, 1950–51, Parts 8–9, p. 252 (The President Dr. Smoira, Olshan and Silberg JJ.).
[13] Psakim, Vol. 3, 1950–51, Parts 8–9, p. 296 (The President Dr. Smoira, Olshan and Silberg JJ.).

III

The Parliament of Israel, the 'Knesset', has enacted a number of statutes which materially affect the law of personal status and the religious laws of all the different religious communities in Israel.

By the law relating to the age of marriage [14] seventeen years was fixed as the minimum age at which women should be capable of concluding a marriage. This provision affects members of many of the religious communities in Israel which permitted marriage at a much earlier age. Anybody marrying a woman below the age of seventeen, or arranging or assisting in celebration of such a marriage, is liable to imprisonment not exceeding two years, or to a fine or to both these penalties. The law further provides that the fact of a marriage having been concluded in contravention of the law shall be ground for action for divorce in all competent courts of the different communities, and that the question whether the accused has complied with a judgment ordering him to divorce his wife, shall be taken into consideration by the court when deciding on the penalty to be imposed.

The law relating to the time of work and rest [15] fixes the time of rest for all the communities in Israel at thirty-six consecutive hours weekly, which should include in regard to Jews the Sabbath, in regard to non-Jews the Sabbath or Sunday or Friday, according to what is customary in each case. The Minister of Labour is, however, entitled to fix by ordinance a time of less than thirty-six hours, but in no case less than twenty-five hours as time of rest. Such ordinance overrides all customs and laws of the different religious communities. The same applies to the powers of the Minister of Labour to permit work on the days of rest generally or partly, when he is satisfied that to cease work on the day of rest would prejudice the defence of the State, or the safety of persons or property, or would seriously endanger the economy of the country or services, which in the opinion of the Minister are essential for the public or part thereof. The Minister of Labour is entitled to grant such a general licence only in virtue of a resolution of a committee of Ministers, composed of the Prime Minister, the Minister of Religions and the Minister of Labour. Certain classes of workers are exempt from the application of this law, *e.g.*, police, sailors, fishermen, air force personnel, certain government officials, workers in confidential positions and workers whose time of work and rest is not subject to the supervision of their employers.

At the time of writing, a Bill providing for the equality of women

[14] Statute Book, 1950, p. 286.
[15] Statute Book, 1951, p. 204.

is being introduced into the Israel Parliament, the ' Knesset ', which, if adopted, would have far-reaching effect on matters of personal status, but would still leave many problems in regard to marriage and divorce unsolved. The Bill provides in its first article for the equality of women before the law, adding, however, that the religious laws in regard to marriage and divorce remain unchanged. This proviso leaves matters of marriage and divorce in the state described above.

Women should, however, in virtue of this new law, be entitled to appear as witnesses in all religious courts and be capable of acquiring property, irrespective whether they are married and whether the property was acquired before the marriage was concluded or thereafter.

In accordance with the Bill a woman will be bound to maintain her husband, and a mother will be obliged to maintain her children, whilst in accordance with Jewish law only the man is bound to maintain his wife and family. The Bill further proposes to change religious law of different communities by appointing women the natural guardians of their children jointly with their husbands. After the death of one of the parents the surviving one will be the only natural guardian. The courts shall, however, be entitled to appoint one of the parents or another person as guardian, the guiding principle being what is best for the child.

The Bill provides for equality of females in regard to inheritance to all property in accordance with the Ottoman law of inheritance, which is modelled on the German law of intestate inheritance. Testamentary dispositions will, however, remain unaffected.

Bigamy will be strictly prohibited, even in cases where the religious law of the persons concerned would permit a bigamous marriage.

The Bill finally makes it a criminal offence for a husband to divorce his wife against her will, unless a competent court has ordered the wife to accept divorce.

The law, if adopted by Parliament, will be binding for all secular and religious courts, notwithstanding any provisions of religious law to the contrary.

R. Gottschalk.

THE NATURE OF THE 'WAR' IN KOREA

In June, 1951, when the Minister of Local Government and Planning dismissed Mrs. Monica Felton from her position as chairman of the Stevenage Development Corporation after her visit to North Korea as a member of a Commission sent to that country by the Women's International Democratic Federation,[1] it seemed to be generally believed in Great Britain that this was the first occasion on which it was necessary to consider the nature of the hostilities in Korea in order to ascertain whether or not Mrs. Felton could be prosecuted for treason. In fact, a similar problem had arisen two months earlier. On April 12 the Press Association issued a letter[2] that had been sent by the Minister of Defence to Mr. Raymond Blackburn, M.P. In March, Mr. Blackburn had drawn attention to certain matters appearing in the *Daily Worker* in connection with the Korean war, and the Minister undertook to bring the question to the attention of the Attorney-General. In his letter the Minister said that the Attorney-General was 'well aware of the undesirable activities of the *Daily Worker* . . . , some of which have every appearance of coming within the definition of treasonable offences. This does, of course, turn to some extent on the question whether or not we are at war with China'. The Minister made no attempt to answer this question, but said 'it seems likely that from a legal point of view the state of hostilities between China and ourselves is sufficient to bring the act of "giving aid and comfort" to the Chinese within the definition of treason. The difficulty about instituting a prosecution, however, is that no other charge than that of treason would be possible, and that the only penalty for treason is death'. In view of this, it was decided that no action should be taken against the *Daily Worker*, just as in April the Director of Public Prosecutions advised that no action be taken against Mrs. Felton.

The problem of whether or not there is a war, in the technical sense of the word, being fought in Korea has also arisen in the United States. There, however, the matter was dealt with by legislation and not administratively. An American soldier who had returned from active service in Korea needed an operation, and

[1] The report of this Commission alleging atrocities against the United Nations and United States forces in Korea is published in the Los Angeles *Korean Independence*, August 1, 8, 15, 22, 29, 1951.

[2] This letter is printed in *The Times*, April 13, 1951.

applied for admission to the Veterans' Administration hospital at Tucson, Arizona. He was denied admission, it having been pointed out by the manager of the hospital that the United States is technically not at war in Korea, and that a Korean ex-service man has the same status as a soldier discharged from the army in peace time. Immediately this incident became known Congress, at the request of President Truman, passed legislation putting Korean ex-service men in the same position as ex-service men of both world wars.[3]

We are not here concerned with the application of the English law of treason, or with other questions of municipal law. Our problem relates to the nature of the hostilities themselves, and it suffices for our purpose to accept the comment of the Attorney-General in September, 1950, when dealing with a question relating to the presence of a *Daily Worker* correspondent with the North Korean forces. On that occasion, Sir Hartley Shawcross pointed out that although the Korean war raised complicated questions of international and municipal law, there was no doubt that the law of treason was applicable.[4]

The problem with which we are concerned was considered by the Australian courts during 1950 and 1951. On April 6, 1951, only six days before the publication of the Minister of Defence's letter, the appeal of the publisher of the Australian communist newspaper *The Tribune*, against a sentence of nine months for sedition, was dismissed.[5]

The Crown had alleged that articles printed in *The Tribune* dealing with the Korean war were intended to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order and good government of the Commonwealth, and to promote disaffection against the Government and Parliament. The article that was most strongly objected to appeared on July 12, 1950, and was occasioned by the seamen's strike of that month. Under banner headlines reading 'Seamen's Patriotic Lead—Stop War in Korea', the newspaper declared 'Not a man, not a ship, not a plane, not a gun for war on Colonial liberation movements in Asia'. In August a Summary Court sentenced William Fardon Burns, the newspaper's publisher, to nine months for sedition, and his appeal against this verdict came before Judge Berne in Sydney on November 13 and 14.[6]

Judge Berne was seriously concerned with the nature of the hostilities in Korea, and for that matter in Malaya, for he said: 'It seems to me that the articles could not possibly be seditious . . . if

[3] *New York Herald Tribune*, May 11, 1951.
[4] *The Times*, September 20, 1950.
[5] *Sydney Morning Herald*, April 7, 1951.
[6] *Sydney Morning Herald*, November 14–5, 1950.

this is an illegal war '. In order to prove the legality of the Korean war and of the participation of Australian troops therein, prosecuting counsel referred to Australia's obligations under the Charter of the United Nations. This argument, apparently, did not appeal to Judge Berne who took an exceedingly narrow view of the wording of the Australian Charter of the United Nations Act.[7] This statute was described as ' An Act to approve the Charter of the United Nations ', and the learned judge stated : ' The view I take is that the United Nations Charter is only an agreement. . . . The Crown did not ratify it. It said it approved of the agreement. It would have been very easy for the Crown to have said that the Charter was approved and ratified. . . . The agreement did not supersede the Constitution and any assistance given in Korea must be justified by law '. There is no need to consider whether Judge Berne's interpretation of this Act and of the nature of the Charter is correct or not, for he immediately went on to say : ' The Commonwealth will not tell me whether we are at war with Korea or not. I insist on knowing that. . . . If what is going on in Korea is not a war, then the newspapers are lying. I refuse to believe it is not a war. . . . I want to know why Commonwealth Ministers say we are at war. Only His Majesty could declare war '.

The learned judge seemed equally doubtful as to the nature of the operations in Malaya. These he described as ' merely police action against terrorists. It is quite legal to use troops to break strikes and load ships. But I do not think it would be legal to quell risings in other countries '.

The problem with which we are concerned was referred to the Australian Foreign Office, whose replies to a number of questions put to it were read in Court. The reading of these replies caused a most unpleasant scene in the court-room. At first Judge Berne refused to allow the Foreign Office statement to be read, and demanded a direct answer, either positive or negative, to the question whether Australia was at war with Korea. When the complete statement was read out there were mutual accusations of bad faith and inexactitudes between the judge and leading counsel for the prosecution. The questions were supposed to have been taken from the transcript of the proceedings, but of one question—relating to the 38th Parallel—Judge Berne said : ' If I asked that question as you have prepared it a sinister construction could be placed on it '. Counsel for the Commonwealth insisted that ' you definitely said it ', and the judge threatened to order him to leave the court if he continued to contradict. Counsel refused to withdraw his statement and left. After his departure junior Crown counsel refused to continue and Judge

[7] Act No. 32 of 1945.

Berne said he would inform the Attorney-General when he was ready to resume. During the dispute between judge and counsel, Mr. Shand, for the Commonwealth, requested that a case be stated to include the question 'Whether his Honour's conduct of the trial has resulted in the respondent—the Commonwealth—being deprived of natural justice?'. On February 12, 1951, a writ of certiorari was granted to the Commonwealth and a new judge instructed to hear the appeal,[8] and, as has already been pointed out, on April 6 the appeal was dismissed.

What is important in the *Burns Case* is not the decision, nor the unseemly quarrels between judge and counsel. From the point of view of international law the most significant feature of the case was the statement issued by the Foreign Office. This was as follows[9]:

'Q. Is Australia at war with North Korea?

'A. The Government has sent land, sea and air forces to Korea to assist in taking military measures in order to restore international peace and security in Korea as provided in Chapter 7 of the Charter of the United Nations. The Australian forces are engaged in active hostilities and have suffered intensive casualties. That Australia is at war de facto is clear. Whether or not Australia is at war de jure depends on the interpretation of the Charter as applied in the circumstances.

'Q. Is North Korea at war with Australia?

'A. Answer as above.

'Q. What is the nature of the warlike operations at present north of the 38th Parallel?

'A. The military operations have proceeded against the 38th Parallel against the resistance of North Korean forces, and are now being carried on in the vicinity of the border between Korea and Manchuria. A feature of these operations is at present under consideration by the Security Council. The Australian Government regards all the Korean operations as having been conducted under the Security Council and in pursuance of the United Nations Charter.[10]

'Q. Is Australia at war with Malaya?

'A. No.

'Q. In both cases, has war been declared?

'A. No declaration has been made in either case.

[8] *Radio Australia News* (London), February 13, 1951

[9] *Sydney Morning Herald*, November 15, 1950.

[10] For a discussion of the activities of the Security Council in connection with the Korean war, see the writer's 'Korea and the United Nations', 4 *World Affairs* (New Series), 1950, p. 414.

'Q. What is the nature of the operations being carried on in Malaya?

'A. The Australian Government has sent air forces to assist His Majesty's Government in the defence of Malaya in suppressing armed insurgents conducting guerrilla warfare in that country to the prejudice of the peace and safety of His Majesty's subjects and territories.

'Q. On what authority does the Commonwealth rely for sending troops to either of these places or the expending of public money for equipping those troops?

'A. The Commonwealth Parliament, having by the Charter of the United Nations Act, 1945, approved the Charter, the Government deposited on November 1, 1945, an instrument of ratification, and the Charter thereupon became binding upon the Commonwealth in international law. The Commonwealth has acted in pursuance of the Charter and of the Defence Act, the Naval Defence Act, and the Air Force Act, and under the provision of appropriations made by Parliament.

'Q. What nations were present as required under Article 27 when the resolution was carried that North Korea was the aggressor?

'A. All members of the Security Council except the U.S.S.R.[11]

'Q. Has the Commonwealth ever recognised North Korea?

'A. The Commonwealth has not recognised "The People's Democratic Republic of Korea".'

This statement makes it perfectly clear that in practice the Commonwealth of Australia regards itself as at war with an unrecognised entity known as 'The People's Republic of Korea'. That being so, even Judge Berne agreed that the article in *The Tribune* was seditious.

It is unnecessary to study in detail the differences between a de jure and a de facto war. The practical effects of both are virtually the same. Experience in the Korean war has made it clear that the United Nations and its enemies regard themselves as at war, and have both declared their intention of conducting their hostilities in accordance with the rules of war. All that need be said is that a war, whatever be the strictly technical meaning of that word, is being fought in Korea. This appears to be the attitude of all the nations that are engaged, and from what has already been said this seems to be clearly the case with the United Kingdom and the United States as well as Australia. Nevertheless, in the

[11] The legality of this decision of the Security Council is examined in the writer's article cited in n. 10 above, at pp. 427–8 and p. 432.

Communist Party Dissolution Case (1951)[12] each of the judges constituting the majority (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.) pointed out that in October, 1950, the date of the passing of the Communist Party Dissolution Act, Australia was at peace. This was important, because the validity of the Act depended to a great extent on the exercise of the Commonwealth's defence power. Not all the judges referred to Korea, although Dixon and McTiernan JJ. did so expressly. Dixon J. pointed out that 'Australian forces were involved in the hostilities in Korea, but the country was not of course upon a war footing, and, though the hostilities were treated as involving the country in a contribution of force, the situation bore little relation to one in which the application of the defence power expands because the Executive Government has become responsible for the conduct of the war'. McTiernan J. expressed the situation even more simply: 'At the time the Act came into force the Commonwealth was not engaged in any hostilities except in Korea. The state of affairs was peace not war'.

The *Burns Case* is not the first case in which a British court has recognised the possibility of a de facto as distinct from a de jure war. In *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co.* [1939] 2 K.B. 544, the Foreign Office pointed out that it was not prepared to say that a 'war' then existed between China and Japan, and stated that 'the attitude of His Majesty's Government may not necessarily be conclusive on the question whether a state of war exists within the meaning of the term "war" as used in particular documents or statutes'. It will be recalled that the Master of the Rolls held that, for the purposes of the charterparty in issue before him, a war was in existence.

Where civil wars are concerned it is not uncommon to find the hostilities being regarded as war de facto. As it was expressed by the Supreme Court of the United States in *The Prize Cases* (1862), 'A civil war is never declared, it becomes such by its accidents. . . . When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence; . . . have organised armies; have commenced hostilities . . . , the world acknowledges them as belligerents, and the contest a war'.[13] Similarly, in *Prats* v. *United States*, decided under the Convention of 1868, the United States-Mexican Mixed Claims Commission stated that 'had Great Britain never recognised the Confederates as belligerents at all, the consequences of the state of war as a fact to Great Britain, as to all other neutral powers, would have been the

[12] 83 C.L.R. 1. The extracts from the judgment are reproduced from the galley proof which has been made available through the courtesy of The Law Book Co. of Australasia Pty. Ltd., the publishers of the *Commonwealth Law Reports*.

[13] 2 Black 635, at pp. 666–7.

same. . . . These rights the United States exercised against Mexico and all other nations, and did it in virtue of the fact of war, and not because of the recognition of the belligerency of the insurgents by those powers or any one of them '.[14]

One could produce numerous examples of de facto wars in connection with civil wars all tending to show that in practice war exists when the facts of war exist. The same is true in international hostilities, for 'the principles of the laws of war . . . are in their essence independent of the formal status of the parties to the struggle. The same considerations of humanity, the same fear of reprisals, and the same desire to avoid involvement exist, whether it be a civil or an international war '.[15] Thus, in the *Kelley Case* (1930)[16] the United States-Mexican General Claims Commission was concerned with a claim arising out of the activities of General Huerta in Mexico. In 1914 American forces landed at Vera Cruz and, after engaging in hostilities with Mexican troops, occupied the city. In the words of the Commission, the 'President expressed a "deep and genuine friendship" on the part of the American people for the people of Mexico, and he stated that he earnestly hoped that war was not at the time in question. However, there was fighting between the Mexican and American forces and the city of Vera Cruz was occupied. . . . In whatever light the landing of American troops at Vera Cruz and the clash of military forces that followed may be viewed, it seems to be clear that when these occurrences took place, . . . hostilities of some considerable duration may reasonably have been anticipated. . . . Without undertaking to classify the incidents of 1914 at Vera Cruz in precise terms of the international law pertaining to war, or measures stopping short of war, or something else, or to apply to such incidents concrete rules of that law, we are of opinion that a proper disposition of the present case may be found in principles of law to which proper application may be given in determining the question of international responsibility '.[17] The Commission then proceeded to refer to 'non-combatants' and to employ other terms which only have meaning in war, including a lengthy analysis of trading with the enemy. Despite the non-existence of any de jure war the Commission applied practical tests and made full use of analogies drawn from the laws of war, treating both parties as belligerents.

It would appear from what has been said, and regardless of the situation in municipal law, that from the point of view of international law a war is being fought in Korea whether the parties to it describe it as a de facto or a de jure war.

L. C. Green.

[14] 3 Moore, *International Arbitrations*, p. 2886, at pp. 2888–9.
[15] Chen, *The International Law of Recognition*, 1951, p. 356.
[16] *Opinions of the Commissioners*, 1931, p. 82.
[17] *Ibid.*, pp. 85, 84.

FINAL CLAUSES IN MULTILATERAL CONVENTIONS

The recent issue of a handbook on *Final Clauses in Multilateral Conventions*[1] by the Legal Department of the United Nations Secretariat, in both English and French, should not be allowed to pass unnoticed, although its actual printing is not expected until 1952.

With regard to the title of the handbook it may be said at the outset that some authorities prefer to employ the terms ' formal ' or ' standard '[2] clauses; but the weight of current practice, as evidenced by its predominant use in conventions concluded under the auspices of the United Nations, lies in favour of ' final ' clauses.

There has always been lacking in the dispatch cases of those engaged in the negotiation and drafting of multilateral conventions a readily accessible compilation of final clauses. Too frequently they have been forced to evolve some ad hoc technique of comparison between the merits of clauses contained in previously concluded conventions. During the period of the League of Nations there was but little standardisation in the drafting of conventions. The need, however, for a greater uniformity was realised, and the preparation was begun by the League Secretariat during the Second World War of a collection of final clauses, but never completed.

By contrast, the technique of the International Labour Organisation developed since its early days a pattern of great consistency, due largely to its ' resemblance to a permanent legislative body '.[3]

With respect to the drafting of multilateral conventions concluded under the auspices of the United Nations, the tendency has been discerned of a general desire to follow precedents wherever possible, and to achieve some form of standardisation. The handbook includes nearly all multilateral conventions which have been drawn up under the auspices of the United Nations or of the Specialised Agencies, and the constituent instruments of the agencies themselves (all of which are here and in the handbook referred to as ' United Nations conventions '), and also nearly all other international multilateral conventions drawn up since 1944, which had been registered

1 *U.N.Doc.* ST/LEG/1. The term ' convention ' is used here and throughout the Handbook to include all types of multilateral instruments whatever their particular designated name.

2 See Henry Reiff, ' A Form Book for Standard Treaty Clauses ', *American Journal of International Law*, Vol. 40 (1946), pp. 640–644.

3 C. W. Jenks, ' The Need for an International Legislative Drafting Bureau ', *A.J.I.L.*, Vol. 39 (1945), pp. 163–179, at p. 172.

before March 1, 1951, with the Secretariat under Article 102 of the Charter. A rough survey of the clauses in these conventions which are listed in the handbook indicates that only a few trends towards standardisation are perceptible with regard to the practice of the United Nations.

Moreover, the hitherto unavailability of any collection of clauses from which comparisons could easily be made has led in some cases to inconsistencies in equally authentic texts,[4] to provisions whose legal effect it has proved difficult to determine absolutely, and to other irregularities.[5]

Few authorities will dispute the view that absolute uniformity of final clauses in United Nations conventions is undesirable since the varied subject-matters involved give rise to different needs. On the other hand, it would be difficult to deny that final clauses of proven worth and workability should be used wherever possible. Clearly, henceforth the attainment of this desirable goal will be facilitated, and the task of the drafters alleviated, by the issue of this handbook. Although preferences for any particular clauses or types of clauses are not indicated—since this would probably be beyond its scope—it undoubtedly will be of great assistance to drafting committees and other experts responsible for the framing of multilateral conventions.[6]

The question of the usefulness of the standardisation of final clauses was raised in the Sixth Committee of the fourth session of the General Assembly during the discussion on the drafting of such clauses for the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. The representative of Australia said that he 'thought it would be extremely helpful if the final clauses of the various conventions prepared under the auspices of the United Nations were drafted in a uniform manner. In that way, a model would be available for the procedural clauses concerning the entry into force of multilateral international instruments'.[7]

In reply, the Assistant Secretary-General in charge of the Legal Department, agreeing with the representative of Australia that 'it would doubtless be useful to establish a uniform practice', commented that 'The question of the final or protocol clauses of

[4] *E.g.*, Section 43 of the Convention on the Privileges and Immunities of the Specialized Agencies, *United Nations Treaty Series*, Vol. 33, p. 261.

[5] *E.g.*, Final protocol of the Convention for the Suppression of the Traffic in Persons and the Exploitation and Prostitution of Others, General Assembly resolution 317(IV), *Official Records of the fourth session of the General Assembly*, *U.N.Doc.* A/1251, p. 35.

[6] Jenks, *loc. cit.*, p. 175.

[7] *Official Records of the fourth session of the General Assembly, Sixth Committee*, 201st meeting, paras. 9, 11 and 12.

international conventions would obviously be given an important place ' in the consideration of the Law of Treaties by the International Law Commission.[8]

In this connection it is of interest to note that the following statement is to be found in the Report on the Law of Treaties by Professor J. L. Brierly, Special Rapporteur to the International Law Commission :

> ' 6. The Rapporteur desires also to point out that, though the preparation of standard clauses for treaties cannot either legitimately or usefully be brought within the rubric of codification of the law of treaties, the intrinsic merits of an undertaking of that sort are not to be underestimated. It is indeed a matter for consideration whether a table of standard clauses should not be annexed to the present draft.' [9]

With regard to the presentation of the handbook the final clauses have been classified into eleven types, each with an explanatory note, as follows :

Clauses providing methods by which States may becomes parties to the convention;
Entry into force clauses;
Clauses establishing which States may become parties to the convention;
Clauses fixing the duration of the validity of the convention;
Clauses providing methods by which States may cease to be parties to the convention;
Amendment clauses;
Colonial clauses;
Clauses providing for the application of the convention under domestic law;
Arbitration, interpretation and settlement of disputes clauses;
Revision clauses; and
Depositary clauses.

It is proposed to offer some general comments on some of these types. The most interesting point to note in the first type, which contains a large number of sub-divisions, concerns the use of the term ' acceptance ' as an alternative to ratification and accession. A number of early United Nations conventions contained a clause offering ' acceptance ' both as a substitute for ratification, and as an equivalent to accession.[10] The term ' acceptance ' was originally

[8] *Ibid.*, paras. 11 and 12.
[9] *Doc.* A/CN.4/23, para. 6.
[10] *E.g.*, Protocol Amending the Agreement for the Suppression of Obscene Publications signed at Paris on May 4, 1910, *United Nations Treaty Series*, Vol. 30, p. 3. See also Brierly's Report, *op. cit.*, *U.N.Doc.* A/CN.4/23, p. 32; and also Liang, ' The Use of the Term Acceptance in the United Nations Treaty Practice ', *A.J.I.L.*, Vol. 44 (1950), p. 342.

introduced to facilitate States with complicated constitutional problems—and notably the United States—to become parties to multilateral conventions. It has, however, fallen into desuetude and disfavour,[11] owing to the fact that it does not appear to have permitted States the freedom they desired and originally expected.

Among the clauses which establish which States may become parties to a convention, may be seen the various formulæ used for inviting the participation of non-Member States in United Nations conventions. Invariably they necessitate a resolution of the United Nations organ concerned setting up criteria upon which the invitations may be based.[12]

The controversial colonial clauses are conveniently set out under three headings : those providing for the optional application of the convention to territories for the conduct of whose foreign relations the contracting States are responsible; those providing for the optional exclusion from the convention of such territories; and those requiring the automatic application of the convention to such territories.[13] The explanatory note to this part of the handbook necessarily contains no reference to the legal position which arises in the absence of any colonial clause in a convention. However, it would appear to be clear that in such a case, when a State becomes a party, the convention also applies to its non-metropolitan territories.[14]

It may be mentioned here that no federal-State clauses are listed in the handbook, and this may well be because there are extremely few examples to be found amongst the conventions from which the clauses have been taken.[15]

It is interesting to note that a large number of United Nations conventions contain clauses providing for the submission to the International Court of Justice of disputes concerning the interpretation or application of the convention. Also noteworthy is the clause

[11] Thus the Sixth Committee of the fourth session of the General Assembly, after a debate on the inclusion of the term ' acceptance ' in the draft convention on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, unanimously rejected it, by voting in favour of a clause incorporating the traditional procedure of signature and ratification or accession. *Official Records of the fourth session of the General Assembly, Sixth Committee*, 200 and 201st meetings.

[12] See Liang, ' Who are the Non-Members of the United Nations? ', *A.J.I.L.*, Vol. 45 (1951), p. 314.

[13] See Liang, ' Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments ', *A.J.I.L.*, Vol. 45 (1951), p. 108.

[14] See Fawcett, ' Treaty Relations of British Overseas Territories ', *British Year Book of International Law*, Vol. 26 (1949), p. 86, at p. 101; McNair, *The Law of Treaties*, p. 77; and *U.N.Doc.* A/Conf.1/45, p. 10, footnote 1.

[15] There has, however, been a considerable amount of discussion relating to federal-State clauses in Organs of the United Nations during the drafting of conventions. See Report on Federal and Colonial Clauses submitted by the Secretary-General at the request of the Commission on Human Rights, *Doc.* E/1721.

to be found in section 30 of the Convention on the Privileges and Immunities of the United Nations,[16] which provides that any Advisory Opinion given by the Court relating to a difference arising between the United Nations and a Member State shall be accepted as decisive by the parties.

A distinction has been drawn in the handbook between amendment and revision clauses, the former containing the specific provisions whereby a convention may be amended, and the latter dealing in general terms with the question of the convening of the conference for the purpose of reviewing the text.[17] Amongst United Nations conventions, amendment clauses are practically only found in the constituent instruments of the Specialised Agencies, and the great majority of such clauses provide that amendments shall become effective after approval by a two-thirds vote of the conference drawing them up, and ratification by two thirds of the members of the organisation.

It may be noted that none of the United Nations conventions containing an amendment clause also contains a revision clause, the latter type being almost invariably found in conventions adopted by the General Assembly. With respect to such conventions, it is difficult to see the legal necessity of a revision clause, since a contracting party may always place the question of revision upon the agenda of the General Assembly, and this, in practice, would differ little from the procedure envisaged in these clauses.

With regard to depositary clauses, it may be observed that some United Nations conventions specify in the very last paragraph of the text that they shall be deposited with the Secretary-General, but that most of those adopted by the General Assembly contain no such closing paragraph, and a regular article provides for the deposit[18] of an instrument of ratification or accession.

One interesting aspect of depositary clauses is that in all cases where the Secretary-General in the name of the United Nations is constituted by the terms of a multilateral convention as its depositary, the registration thereof under Article 102 of the Charter may be effected *ex officio* by the Secretariat.[19]

The absence of a listing of reservations clauses in the handbook is not too remarkable since only the Convention on the Declaration

[16] *United Nations Treaty Series*, Vol. 1, p. 15.

[17] This distinction may have been taken from Articles 108 and 109 of the Charter.

[18] See, for some interesting remarks on the functions of the Secretary-General as depositary, Leriche, ' L'Evolution de la Société internationale et les traités multilateraux ', *Revue de Droit International* (Sottile) 1951, No. 1, p. 16, at p. 34.

[19] See General Assembly resolution 364(IV) which approved the addition to this effect of a sub-paragraph (c) to paragraph 1 of Article 4 of the Regulations to give effect to Article 102 of the Charter (resolution 97(I)).

of Death of Missing Persons, amongst conventions concluded under the auspices of the United Nations, contains a reservations clause,[20] although a number of conventions previously concluded under the auspices of the League of Nations, which were amended by the General Assembly, still retain reservations clauses.[21] This absence, which led in the case of the Convention for the Prevention and Punishment of the Crime of Genocide to the Advisory Opinion of the International Court of Justice on the effect of reservations to that Convention and objections thereto, is to be regretted. Clearly, one effective way of dealing with the problem of reservations is to have a clause in every convention specifying the articles to which reservations [22] may be made, the effect of objections thereto by other States, including parties, signatories, and those entitled to become parties, and also the functions to be exercised by the depositary.

For this reason the draft Articles on Reservations included in an annex to Professor Brierly's Report on Reservations to Multilateral Conventions [23] to the Third Session of the International Law Commission, are to be welcomed. These draft Articles have been discussed and modified by the International Law Commission at its Third Session in Geneva. The latter's Report and the Advisory Opinion from the court will then come before the Sixth Session of the General Assembly in Paris. It is therefore inappropriate to offer any further commentary here.

MICHAEL BRANDON.[24]

[20] Article 19.

[21] See *International Court of Justice*, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Statements in Court, *I.C.J.Distr.* 51/81, Statement by Dr. Kerno, representative of the Secretary-General, p. 11.

[22] A welcome preliminary step would be an authoritative statement from the Court as to what actually constitutes a reservation. See Brandon, 'The Legal Nature of a Reservation to a Multilateral Convention', *Canadian Bar Review*, Vol. XXIX (1951), p. 428.

[23] *U.N.Doc.* A/CN.4/41, Annex E.

[24] The views expressed in this article are the personal views of the author.

NOTES

Public and Private International Law

The *Supplies and Services (Defence Purposes) Act, 1951*, s. 1, empowers the Government to use the Defence Regulations and other instruments, which derive their authority from the Supplies and Services (Transitional Powers) Act, 1945, for purposes of defence and the maintenance of world peace.

Section 1 (1) of the Act of 1945 provided that ' If it appears to His Majesty to be necessary or expedient that any Defence Regulation to which this section applies should have effect for the purpose of so maintaining controlling and regulating supplies and services as to (certain purposes set out) . . . he may by Order in Council direct that the Regulation shall have effect by virtue of this Act whether or not it is for the time being necessary or expedient for the purposes specified [1] in Emergency Powers (Defence) Act, 1939, s. 1 (1) '. Section 1 (1) of the new Act provides that the purposes set out in section 1 (1) of the Act of 1945 ' shall be deemed to include, and always to have included, the purposes of

(*a*) providing or securing supplies and services required for the defence of any part of His Majesty's dominions or any territory under His Majesty's protection or in which he has jurisdiction, or for the maintenance or restoration of peace and security in any part of the world, or for any measures arising out of a breach or apprehended breach of peace in any part of the world; and

(*b*) preventing supplies or services being disposed of in a manner prejudicial to the defence of any part of His Majesty's dominions or any such territory as aforesaid or to peace and security in any part of the world or to any such measures as aforesaid . . . '.

This ill-defined extension of the power of the Crown is no doubt to cover the inadequacy of the United Nations Act, 1946. Under that Act the Crown was authorised to carry out by Order in Council ' decisions ' of the Security Council under Article 41, that is to say broadly, the application of economic and like sanctions to an aggressor country. It could hardly have been foreseen in 1946

[1] *Viz.*, for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged and for maintaining supplies and services essential to the life of the community.

that the Security Council would meet aggression with immediate military action and without taking first the steps set out in Article 41; that it would do this not by a ' decision ' but by a ' recommendation ' under Article 39; and that the General Assembly would in point of fact abrogate to itself responsibility for the maintenance of peace and security. All these have come about so as to render the United Nations Act, 1946, almost useless; for the present action in Korea and for possible action under the General Assembly's ' united action for peace ' resolution there is nothing in that Act on which the Government could effectively rely. The new Act goes far to enable the Government to take action required or recommended by the United Nations, though it does not settle the vexed question whether the Korean hostilities, for example, are ' a war in which His Majesty is engaged ' so that the North Koreans and Chinese are enemies for such purposes as treason and trading with the enemy at common law. But the saving in section 1 (2) of the Act that ' Nothing in the said Act (see the Act of 1945) or in this section shall be held to authorise the suppression or suspension of any newspaper, periodical, book, or other publication ' [2] suggests that adherence in published writings to the cause of a declared aggressor, against which the United Nations is taking action is not to be regarded as an offence.

Decisions

Novello & Co. Ltd. v. *Hinrichsen Edition, Ltd.* [1951] 2 All E.R. 457: Copyright—Emergency legislation.

A note on the judgment delivered by Mr. Justice Wynn-Parry in *Re Novello & Co. Ltd.* v. *Hinrichsen Edition, Ltd. and Max Hinrichsen* [1] was published in 4 I.L.Q. 377. Since that note had gone to press the appeal by the plaintiffs was heard by the Court of Appeal (The Master of the Rolls, Jenkins and Birkett, L.JJ.). The appeal was unanimously dismissed on June 29, 1951. Leave to appeal to the House of Lords was refused. The finding by Mr. Justice Wynn-Parry that the court could pay no attention whatever to the transfer of the business of C. F. Peters to two members of the Nazi party under the anti-Jewish German legislation and that, therefore, the second defendant Max Hinrichsen succeeded to the copyrights formerly held by his father Henri

[2] But this protection for the press does not at present exist in Singapore, where a newspaper has been suspended under Government ordinance for its attitude to the Korean hostilities. Singapore is not one of the territories to which the new Act is applied, under section 4, by the Supplies and Services (Defence Purposes) (Colonies) Order in Council, 1951, SI No. 1241.

[1] [1951] Ch. 595; [1951] 1 All E.R. 770.

Hinrichsen—a question hotly discussed in the first instance—has no more been challenged by the plaintiffs on appeal. The Court of Appeal was, therefore, concerned only with the construction of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 (hereinafter referred to as Emergency Act).

As stated in the note referred to, two non-exclusive licences had been granted to the plaintiffs under that Act, the first on February 19, 1940, the second on June 1, 1948. In 1940 the English copyrights in question were enemy-owned whereas when the second licence was granted in 1948 all beneficiaries under the will of Henri Hinrichsen were free from enemy character (see paragraph V of the said note).

The questions to be considered by the Court of Appeal were the following:

(1) Could Max Hinrichsen as owner of the copyrights grant a licence to the defendant company in spite of the powers conferred upon the Comptroller-General under the Emergency Act?

(2) Had the Comptroller-General jurisdiction to grant the second licence in 1948?

1. Regarding the first question, counsel for the plaintiffs contended that the Emergency Act took away the right of copyright owners to which the Act applied to exercise the copyright and, therefore, the right to grant licences, as long as the Act was in force. Sir Raymond Evershed showed that the result of this viewpoint would be to suspend for the entire term of the copyright all the rights of the owner if he or his predecessor in title has been an ' enemy ', for however short a time. He considered the provisions in the Emergency Act in turn, the reading of which seemed to him to ' appear in a crescendo ', and stated that he was unable to find anything in the Act that could support the plaintiffs, and, in fact, the purpose of the Act was not, as counsel meant, to ' sterilise ' copyrights of enemy character, but on the contrary, to prevent their sterilisation. Jenkins L.J. added: ' Upon the true construction of the Emergency Act its effect is that, subject to the restrictions imposed by the Trading with the Enemy Act, 1939, owners of copyrights to which the Emergency Act applies, are still free to exercise their rights unless and until some licence affecting them is granted by the Comptroller. Such a licence, when granted, ousts any exercise of the owner's rights which would be inconsistent with the terms of that licence '. Consequently, Max Hinrichsen was held entitled to grant a licence to the defendant company.

It should be noted that the Emergency Act in question, unlike others passed about the same time, is not limited in its duration

by reference to ' the emergency ' and it will, therefore, remain on the statute book until repealed. Although the Comptroller-General is not likely to grant many more licences under the Act he remains entitled to do so; the construction given to the Act by the courts in this case is, therefore, of great importance, all the more so as the principle stated by the courts applies to patents and trade marks as well.

2. As to the second question, counsel for the plaintiffs argued on the wording of section 2 (1) (*a*) of the Emergency Act that the Comptroller had power to grant a licence where an ' enemy ' or ' enemy subject ' has *at any time* since September 3, 1939, been the owner of a copyright (and the same would apply to patents and trade marks). Counsel followed therefrom that the second licence could be granted because an ' enemy ' had owned the copyrights in question for some time, although at the date of the grant the owner (Max Hinrichsen) had shed his enemy character. Mr. Justice Wynn-Parry rejected such a construction but held that a compulsory licence could be granted only if the copyright was owned by an enemy or enemy subject *at the date of the application* for such a licence, so that the grant of the second licence was held to be ultra vires of the Comptroller. The Master of the Rolls declared that in consequence of the view he took on the first question it was unnecessary to express a concluded opinion upon the second point of construction. He said that it did indeed seem startling that the rights of the Comptroller to grant licences would persist for years and years simply because at some time, however short, the copyright owner or his predecessor in title might, for a short time have been, for example, in an occupied country, but, on the other hand, the language used in the Act seemed to imply such meaning. The question, therefore, was left open.

The decisions delivered in this case have much contributed to the elucidation of questions which arose out of the somewhat obscure wording of the respective provisions in the Emergency Act.

Paul Abel.

Pugh v. *Pugh* [1951] 2 All E.R. 680 : Capacity to conclude marriage—Age of Marriage Act, 1929—lex domicilii of husband.

' The capacity of parties to a marriage is governed by the law of the intended matrimonial home, which shall prima facie be deemed to be the lex domicilii of the husband at the time of the marriage.' So boldly states Dr. Cheshire in the third edition of his well-known book on *Private International Law*. The recent

case of *Pugh* v. *Pugh* is an apt illustration of how far in fact the courts are from accepting this view.

In October, 1946, a fifteen-year-old girl who was a domiciled Hungarian went through a form of marriage in Austria with a British subject domiciled in England but on active service in Austria. They lived together in Austria and Germany at places where the husband was stationed, it being his intention after his service abroad to settle down with his wife in England. In 1948 a child was born. In October, 1950, they came to England to stay permanently. Differences arose and the wife presented a petition for nullity on the ground that she was under the age of sixteen when she married the husband.

If Hungarian law was to adjudge the validity of the marriage, it was valid; if Austrian law, then too it was valid; but if English law, it was void, since by the Age of Marriage Act, 1929, section 1: 'A marriage between persons either of whom is under the age of sixteen shall be void'.

The wife submitted that English law governed for two reasons. The first was that the 1929 Act was extra-territorial in effect and governed the husband as a British subject with an English domicile wherever he might marry. The second was that—in the words of Pearce J.—'the validity of such a marriage as this has to be tested as to its essentials by the law of the country of the husband's domicile, or, alternatively, see *De Reneville* v. *De Reneville*, by the country of the proposed matrimonial home'.[1] The wife won on both grounds. On the surface it would seem that the success of the wife's second contention provides a perfect vindication of Dr. Cheshire's thesis; but we submit that in fact nothing could be further from the truth.

Pearce J. did not himself consider his judgment such a vindication but merely an instance of incapacity to marry under the personal law of one of the parties to a purported marriage. This is shown clearly by his final words: 'In view of these authorities it is clear that the marriage was not valid since by the law of the husband's domicile it was a marriage into which he could not lawfully enter'.[2] Indeed the most recent of the authorities to which the learned judge referred was the decision of Bennett J. in *Re Paine*,[3] a case soundly berated by Dr. Cheshire as completely inconsistent with his doctrine.

In *Brook* v. *Brook*,[4] the House of Lords had laid down that:

1 [1951] 2 All E.R. 681.
2 [1951] 2 All E.R. 688.
3 [1940] Ch. 46.
4 (1861) 9 H.L.C. 193.

'While the forms of entering into the contract of marriage are to be regulated by the lex loci contractus, the law of the country in which it is celebrated, the essentials of the marriage depend upon the lex domicilii'.[5] But this distinction between forms and essentials was in great measure superseded by that evolved by Cotton L.J. in *Sottomayor* v. *De Barros* (1)[6] between 'all questions relating to the validity of the ceremony' and questions relating to 'personal capacity'. Just as all questions relating to the ceremony were referred to the law of the place of contracting, so in a whole string of cases the personal law of the parties was applied to questions of capacity.

This is how the authorities stood when Dr. Cheshire wrote his third edition in 1947, but since then three important cases have been decided whose total effect on the law has yet to be adequately assessed. For in *De Reneville* v. *De Reneville*[7] Lord Greene M.R. laid down that: 'The question whether the marriage is void or voidable is for French law to answer. My reasons are: The validity of a marriage so far as regards the observance of formalities is a matter for the lex loci. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because (a) that is the law of the husband's domicile at the time of the marriage, or (b) (preferably, in my view) because at that date it was the law of the intended matrimonial domicile'.[8] This was followed in 1949 by *Casey* v. *Casey*,[9] where Bucknill L.J. said: 'Should the question whether the marriage is void or voidable be decided by Canadian or English law? The law of Canada, because the husband is domiciled in Canada, and because at the date of the marriage it was the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage'.[10] Here at last we find undoubted modern judicial expression of the concept of the intended matrimonial home, but note that it is not framed in terms of capacity such as Dr. Cheshire envisaged but in terms of the old *Brook* v. *Brook* concept of form and essentials. Nor is the reason far to seek, for all the cases up till 1947 had turned upon marital capacity—that was the only type of essential with which the courts had had to deal. Admittedly, the actual issues for decision had varied, indeed varied infinitely, embracing the right

[5] *Ibid.*, 207—*per* Lord Semphill L.C.
[6] (1877) 3 P.D. 1, 5.
[7] (1948) P. 100.
[8] *Ibid.*, 114.
[9] [1949] 2 All E.R. 110.
[10] *Ibid.*, 116.

of a man to wed his brother's widow,[11] the remedy of a young lady who had been intimidated into marriage[12] and even the ability of a Royal Duke to marry without the consent of the Sovereign.[13] But still what was ultimately at stake in every case was capacity: In the given circumstances was the husband or wife competent to marry the other? On the other hand, *De Reneville* v. *De Reneville* brought up a totally different point for decision; namely, whether wilful refusal to consummate a marriage rendered that marriage void or voidable. No possible question of capacity to marry could arise since the whole case hinged upon what took place after the marriage. Had the parties cohabited? And, if not, how did that operate to invalidate the marriage? *Casey* v. *Casey* was a similar case, and in it Bucknill L.J. himself stressed the fact that, 'The essential difference between *Sottomayor* v. *De Barros* (1) and the present case is that the marriage in the present case was valid in all respects so far as form and capacity were concerned. It is merely voidable because of the wilful refusal of the husband to consummate it'.[14]

Then, in 1950, came *Kenward* v. *Kenward*[15] when the Court of Appeal, faced once again with a pure question of capacity when a husband was pleading that his consent to his marriage had been induced by his own mistake, reverted to the *Sottomayor* v. *De Barros* (1) formula and expressly adopted Hodson J.'s dictum, 'Questions of consent are to be dealt with by reference to the personal law of the parties rather than by reference to the law of the place where the contract was made'.[16]

Finally, in *Pugh* v. *Pugh*, although the case only raised a point of capacity, Pearce J. introduced into his judgment both the distinction between forms and essentials and that between ceremony and capacity. For in his introductory remarks at the commencement of his judgment the learned judge speaks of *De Reneville* v. *De Reneville* and the intended matrimonial home; but when he comes to deal with the question itself he first cites *Brook* v. *Brook* as showing that 'the law of the domicile is the law which regulates the essentials of the marriage', then goes on to quote *Sottomayor* v. *De Barros* (1), and finally bases his decision on the husband's incapacity by his personal law.

How may these doctrines be harmonised within the law? We submit: only by a paradox. One must admit that the courts have

[11] *Brook* v. *B.* (1861) 9 H.L.C. 193.
[12] *Hussein* v. *H.* [1938] P. 159.
[13] *Sussex Peerage Case*, 11 Bl. & F. 85.
[14] [1949] 2 All E.R. 110, 114.
[15] [1950] 2 All E.R. 297.
[16] [1949] 2 All E.R. at 963.

in part accepted the concept of the intended matrimonial home, but in a context completely different from that in which it was worked out by Dr. Cheshire, who dealt with it under the general heading of Capacity. For the law might well now be stated as follows: The formal validity of a marriage is governed by the lex loci celebrationis, the law of the country where the marriage took place; its essential validity is regulated by the lex domicilii. But what is meant by the lex domicilii? It depends entirely upon the nature of the essential being considered. If the essential is one personal to the parties and arises from a fact or situation anterior to the marriage—for example, if it deals with Capacity—it is the personal law or laws of the parties that governs. But if the essential is a question of the effect on the validity of a marriage of acts of the parties posterior to the marriage then it is governed by the law of the intended matrimonial home, which is presumed to be the law of the domicile of the husband at the time of the marriage.

To this last point a minor caveat must be added. It is not merely the law of the intended matrimonial home that governs; it is the law of the actual matrimonial home. In *De Reneville* v. *De Reneville* and *Casey* v. *Casey* the actual and the intended matrimonial home were one and the same, but the position is rather more difficult where the parties before the marriage intend to settle permanently in country A but on marriage, for some reason or other, they change their minds and set up a permanent home in country B where the husband steadfastly and wilfully refuses to consummate the marriage. Surely even Dr. Cheshire would not claim that the question whether the marriage is void or voidable should in these circumstances be decided by the law of country A?

Dr. Cheshire might validly claim in defence of his doctrine that in all the cases—even those openly decided on the basis of capacity—the personal law of the particular spouse whose marital capacity was in question was also the law of the intended matrimonial home. This could mean that none of the cases, not even *Sottomayor* v. *De Barros* (1), is in the last resort inconsistent with the intended matrimonial home doctrine in its full vigour. It is all very well for Dr. Cheshire to turn the cases inside out as it were to make them fit in with his views but such an approach does not seem to commend itself to the judiciary, which will not lightly accept the opinion that when one of its learned members expressly says one thing he should be taken as laying down something completely different; witness Pearce J.'s following of Bennett J.'s express reasoning in *Re Paine*.

Indeed only last year in a rather similar context the South African Court of Appeals showed how little weight the judges attach

to such ingenious treatment of the cases. In *Frankel* v. *C.I.R.*[17] the issue was which law was to govern the effect of marriage upon the proprietary rights of the parties in movables in the absence of an express contract. The accepted judicial view is that it is the law of the husband's domicile at the time of the marriage that governs. However, Dr. Cheshire claimed that 'there is respectable juristic authority in favour of the law of the intended matrimonial home'.[18] Yet the South African court, despite the fact that there was a clear and well-established intention to set up the matrimonial home permanently in South Africa, and despite the fact that that home was so set up within four months of the marriage, yet held that the governing law was the law of the husband's domicile at the time of the marriage, which was German.

F. S. Bresler.

Hangkam Kwingtong Woo v. *Liu Fan Fong* (*Judgment of the Privy Council, July* 23, 1951):—British territory in enemy occupation—enemy status in the local courts—the line of war.

The appellant was in September, 1942, a resident of Hong Kong, where he carried on the business of a solicitor, and was the registered owner of certain land and a messuage, which was subject to a first mortgage for 73,000 Hong Kong dollars and to a second mortgage for 30,000 dollars. Hong Kong was from December 25, 1941, until September 1, 1945, under effective Japanese occupation and control. On October 6, 1942, the appellant, apprehending arrest by the Japanese, left Hong Kong for Free China, having on September 15, 1942, given to one Chan Hung Cheung general powers of attorney, in English and in Chinese, to manage his affairs in his absence; the English power authorised Chan to sell the appellant's real and personal property as he saw fit. By Order, effective from June 1, 1943, the Japanese authorities made 'military yen' the only permissible currency in Hong Kong, the rate of conversion from the former currency being four dollars to one military yen. On August 21, 1943, Chan entered into an agreement, in exercise of his power of attorney, to sell the appellant's land and messuage to one Koo Wan Sing. The price was to be 68,000 military yen and it was agreed that the property was free of any mortgages, pledges, or other incumbrances. The whole of the purchase money was duly paid. In September and

[17] (1950) 1 S.A.L.R. 220.
[18] Page 652

October, 1943, both mortgages were paid off in military yen at the prescribed rate of exchange; but the sale was never effectively completed, and on May 25, 1946, the purchaser, Koo Wan Sing, died. In February, 1946, the appellant had returned to Hong Kong and on May 24, 1948, the purchaser's executrix commenced proceedings there claiming specific performance of the agreement of August 21, 1943. Specific performance was decreed and the Supreme Court of Hong Kong dismissed the appellant's appeal from that order. He now appealed to the Privy Council, which also dismissed his appeal.

Lord Simonds delivered the judgment of the Board (Lord Simonds, Lord Normand, Lord Oaksey, Lord Radcliffe, The Chief Justice of Canada (Rt. Hon. T. Rinfret):—

(i) The first defence to the claim (of the respondent) is that at all material times the appellant and Chan were divided by the line of war . . . and therefore the power of attorney was cancelled or abrogated;

(ii) 'It is constantly to be borne in mind that it is the law of Hong Kong which is to be administered and the question therefore is: assuming that the common law of England in regard to trading with the enemy prevails in the colony, what is the common law of England in this matter if England is itself enemy occupied territory? To ask this question is to plunge into the unknown. But upon the answer to it depends the issue what is the law of Hong Kong when Hong Kong is in enemy occupation';

(iii) in the absence of authority, in the form of case-law or institutional writings, the problem must be solved by reference to the principle upon which at common law trading with the enemy is held to be illegal and indeed criminal and by asking 'whether upon that principle the Courts of England (if England were occupied territory) or of Hong Kong, as in the present case, are bound to hold that contractual relations are abrogated between its citizens, who are temporarily divided by the line of war . . .'. Their Lordships would refer to Professor McNair's treatise on *Legal Effects of War*, 2nd ed., p. 171, and following, as containing an accurate and adequate exposition of this matter;

(iv) 'It is to be observed that the common feature of every statement of the principle and its reason is that the person with whom intercourse is illegal is regarded as an enemy by the court which has to determine the illegality. . . . To take the present case, whom were the courts of occupied

Hong Kong to regard as an enemy, to whom deny persona standi in judicio? Presumably not to the appellant, who had escaped from the occupied territory and sought refuge among the King's allies : to him no taint of enemy character could attach. To Chan then, the attorney, who remained in Hong Kong? But to whom, if not to Chan, were the courts of Hong Kong open? The result seems plainly to ensue that, whatever consequences may follow outside the occupied territory if one of its inhabitants, who has left it, seeks to maintain or to initiate relations with another who has stayed within it, yet the courts of that country cannot regard either him who has left or him who has stayed behind as enemies of the King or as enemies of each other '.

(v) It becomes unnecessary to determine whether a general power of attorney is an instrument of a kind which must in ordinary cases be regarded as abrogated when donor and donee are divided by the line of war. For, even if it is, it is not, as their Lordships hold, to be regarded as abrogated in the extraordinary case now under appeal '. Nevertheless Lord Simonds expressed doubts as to the correctness of *Tingley* v. *Muller* [1917] 2 Ch. 144.

The further pleas of the appellant, that the agreement had been frustrated and that equitable relief should be refused on grounds of hardship to him, were also rejected.

Battat v. *The King* (*Judgment of the Privy Council, May* 9, 1951): Singapore Finance Regulations derived from Kandy Proclamation —validity.

The appellant was convicted by the High Court of Singapore on October 20, 1949, for offences against the Singapore Finance Regulations. These regulations were made on January 4, 1946, by the Controller, Finance and Accounts and approved by Chief Civil Affairs Officer under Finance Regulations Proclamation, s. 3; this proclamation had been made on December 31, 1945, under the Military Administration (Delegation of Powers) Proclamation, which was itself made on October 1, 1945, by the G.O.C. Military Forces, Malaya, in the exercise of powers conferred on him by the Military Administration Proclamation, declared at Kandy on August 15, 1945, by the Supreme Allied Commander, S.E. Asia.

Their Lordships were of the opinion that even upon the assumption that the Kandy Proclamation was invalid in origin it had been validated and continued in force by means of subsequent legislation, namely, the Straits Settlement (Repeal) Act, 1946, the Singapore

Colony Order in Council, 1946, No. 464, made under it, and in particular the Indemnity and Validating Ordinance, 1946, made under the Order.

The interesting question whether the Supreme Allied Commander, S.E. Asia, had power to legislate for British territory by means, for example, of the Kandy Proclamation and the proclamations and regulations derived from it, was neither decided nor argued; nor was the further point, taken by the appellant at his trial, that the conditions prevailing in Singapore did not in any case justify the exercise of such powers by the Supreme Allied Commander. It appears, however, that the Court of Criminal Appeal of Singapore took the view that the Kandy Proclamation was invalid so far as it was sought to base Singapore legislation upon it, but dismissed the appellant's appeal on the grounds adopted by the Privy Council. The Privy Council in giving its reasons for dismissing the appeal was careful to ' emphasise that Counsel for the Crown did not accept the decision of the Court of Criminal Appeal on this issue and was prepared if necessary to support the conviction on the ground of the original validity of this Proclamation. No inference adverse to this contention is therefore to be drawn from the fact that this judgment hereafter proceeds upon an assumption of the invalidity of the Kandy Proclamation '.

Kohnke v. *Karger* [1951] 2 All E.R. 179—Separate causes of action against two defendants for same damage—effect of satisfied foreign judgment against one defendant.

The plaintiff was injured in a collision between the car, in which she was travelling in France, driven by the defendant, and a lorry driven by a Frenchman. On February 11, 1949, a correctional court in France found the lorry driver guilty of causing by his negligence the plaintiff's personal injuries and in disposing of her civil claims, as it was competent to do at the same time under French law, it attributed responsibility for the accident as to three-fourths to the lorry driver and as to one-fourth to the defendant: on appeal by the lorry driver and his employers, the Court of Appeal of Paris altered these proportions to two-thirds and one-third, and damages amounting to £1,428 (1,400,000 francs) were awarded to the plaintiff. By February 10, 1951, the whole of this sum had been received by the plaintiff, and the defendant later paid over one-third of this amount to the lorry driver.

On December 7, 1949, the plaintiff brought an action in the King's Bench Division against the defendant, who resided in England, claiming damages for personal injuries and loss caused or

contributed to by his negligence in the case, but undertook to give credit to the defendant for the amount recovered by her in France.

Lynskey J., giving judgment for the plaintiff for £835 damages:—

(i) 'If a person suffers damage as a result of the independent wrongs of two others and recovers, whether as a result of a judgment or otherwise, in respect of the whole of his damage from one of them, then, apart from any question of subrogation, he could not claim in respect of any of that damage a second time from the other of the wrongdoers. . . . Where the judgment which is satisfied is that of a court of competent jurisdiction in this country and is in respect of the same damage although resulting from different wrongs, the old courts of equity, and now the High Court exercising its equitable jurisdiction, would interfere to prevent such double satisfaction'.

(ii) The principles on which damages are assessed differ in different countries and the English court is not bound by the French court's assessment of damages; and therefore

(iii) there is nothing in principle to prevent the plaintiff from bringing an action against the second defendant in England for the same damnum, even though she had obtained a judgment, which is satisfied, in France against the other defendant; but

(iv) though it is unnecessary to decide the question in view of the plaintiff's undertaking, 'I should have thought that, as the damages to which she was entitled had been pro tanto satisfied by what she had received from the lorry driver, her damages must be reduced by that amount in her claim against the defendant';

(v) since the award of the French court was less, for various reasons arising from the French mode of assessment, than what would be regarded here as full satisfaction of the plaintiff's claim, she is entitled to judgment for the further sum assessed at £835.

The effect of the decision appears to be this, that (1) where there are two causes of action against separate defendants, founded upon the same damnum, a satisfied foreign judgment against one of the defendants is not a bar to proceedings against the other in England if the damages assessed by the foreign court are less than what would be awarded by an English court for that damnum; but (2) the damages awarded in the English action may not, together with those received under the foreign judgment, exceed the damages

that an English court would have awarded had there been a single action in England.

Maher v. *Maher* [1951] 2 All E.R. 37: Marriage in England—confessional divorce in Egypt.

H, a Mohammedan domiciled in Egypt, married W, a Christian domiciled in England, at Cambridge register office on March 4, 1946. It was their intention to make their permanent home in Egypt after H had graduated at Cambridge University. On June 16, 1946, H went alone to London and since that date W had never seen him. In August 1946 she received through the Egyptian Embassy in London the certificate of a divorce effected by H in Cairo on June 29, 1946. The certificate showed that the husband had appeared with two witnesses before the Cairo Court of Personal Status and declared that he had divorced his legally married wife by the words: 'My wife Kathleen Mary Collet is divorced from me by three divorces'. W petitioned for dissolution of the marriage on the ground of her husband's desertion. Decree nisi.

Barnard J:

(i) the Cairo divorce was shown upon expert evidence to have been in accordance with the Mohammedan religion and to be valid in Egypt;

(ii) the divorce was not contrary to natural justice, in that W had no notice of the proceedings, since 'in the present case there were no divorce proceedings and no amount of notice would have enabled the wife to have contested the husband's unilateral declaration of divorce'; but

(iii) 'the marriage . . . was a civil marriage pursuant to the Marriage Acts, 1811 to 1939, which laid down certain regulations for the contracting of monogamous marriages. It was a marriage in the Christian sense and cannot be dissolved by a method of divorce which is appropriate to a polygamous union;

(iv) I therefore find that the marriage solemnised between the wife and the husband is a valid and subsisting marriage, . . . and I am satisfied that the charge of desertion has been established'.

In the course of his judgment, Barnard J. cited passages from the judgments of Viscount Reading C.J. and Swinfen Eady L.J. in the *Hammersmith Marriage Case*, and added: 'I do not think that Lord Reading C.J., in stating that the wife became subject to the law of her husband's domicile meant to detract in any way from his previous statement that there must be a decree of divorce of a court

of law ' in order that an English marriage may be dissolved for English purposes. But Barnard J. did not determine whether the Cairo Court of Personal Status was or was not a court of law in this sense and rested his decision rather on the second ground taken in the *Hammersmith Marriage Case*, namely, that talak, or unilateral declaration of divorce by a husband, is inapplicable to an English marriage contract. The first ground—absence of a judicial decree —criticised by Dr. Cheshire,[1] seems then to be given passing approval but not in fact adopted in the present case.

Carse v. *Coppen*, 1951 S.L.T. 145—Purported creation by Scottish company of a floating charge upon its English assets—lex domicilii and lex situs.

A company incorporated under Companies Act, 1929, and having its registered office in Glasgow borrowed two sums of £15,000 and £10,000 from the respondent Coppen; and in respect of each a debenture executed in Glasgow was granted in his favour and registered in London in accordance with the provisions of Part III of Companies Act, 1948. The debentures purported to create a floating charge over the company's undertaking and assets wherever situated; at that time the company had a place of business and certain movable assets in England. In the subsequent liquidation of the company, a receiver was appointed in respect of property comprised in the debentures. On a petition to the Court of Session by the liquidator, against the creditor and receiver as respondents, that the debentures did not create a valid floating charge on the company's English assets, the Lord Ordinary so found. The respondents reclaimed before the First Division, which denied the motion.

Lord President (Cooper):—

(i) ' A floating charge is utterly repugnant to the principles of Scots law and is not recognised by us as creating a security at all. . . . But it does not necessarily follow, the respondents argue, that Scottish companies cannot create floating charges as regards English assets '; but

(ii) The company cannot under Scots law, which is the law of its domicile, create securities by such methods; nor could it do so even if enabled by the lex actus for ' it would never do to allow Scottish companies to create unrestricted floating charges over English assets by the

[1] *Private International Law*, 3rd ed., pp. 484 sqq.

simple expedient of sending two directors and a secretary across the border to sign the relative documents '.

Lord Carmont pointed out that there was no general power in the company's memorandum of association to create floating charges on the English assets; had there been, execution in England against the assets might be justifiable but he doubted even then whether an attempted general charge over all the company's assets could take effect ' as an equitable mortgage if as is the case the law of the domicile of the company does not recognise such general charges '.

Lord Russell also concurred, but reserved his opinion on the question whether the company (having express or implied powers of borrowing) could create a floating charge limited to assets ' furth of Scotland '.

Lord Keith dissented. He held that the law of England as lex loci rei sitæ must determine the question whether the debentures created rights over the English assets, no objection to their *formal* validity having been taken or established; and he relied on *Inglis* v. *Robertson, re Queensland Mercantile and Agency Co.* [1891] 1 Ch. 536; 2 Ch. 219, and *Connal* v. *Loder* (1868) 6 M. 1095, in holding that the debentures created a valid charge.

This case was apparently one of first impression in Scotland. The majority plainly took the view that the issue before them was one of the capacity of the company to create the purported charges; while Lord Keith concerned himself solely with the incidents of the charges. It being agreed that a floating charge cannot be created or executed in Scotland upon assets in Scotland, there were three possible approaches to the present case: (i) the Scottish company was incapable of creating any floating charge on assets outside Scotland; this was the view of the Lord President and, with some hesitation, of Lord Carmont. It interprets the law of Scotland as denying to companies, incorporated there, the power to create any floating charge. The Lord President supported this interpretation by his reading of Part III of the Companies Act, 1948, that it was confined, as regards provision for the conduct of a receiver under a floating charge, to companies registered in England for the plain reason that Scottish companies *cannot* create floating charges. Lord Keith did not think that such an inference could be drawn from the Act and that consideration of its provisions in this case led to ' largely negative results '. (ii) The Scottish company was capable of creating a floating charge on assets in England if expressly empowered to do so by the memorandum of association; Lord Carmont moved towards this position but drew away again, while Lord Russell intimated that this might well have been his

view had the company's memorandum in the present case so provided. Logically it seems the best. (iii) The Scottish company had the power to create the floating charges in the absence of terms in the memorandum of association forbidding it to do so. It seems that it was upon this assumption that Lord Keith resorted to English law, as the lex loci rei sitæ, to determine the incidents of the charges. This assumption can, it is submitted, be made if and only if the capacity of the company to create the charge was governed also by the lex situs; but this appears to be contrary to principle at least where the English assets are movables.

Re Dulles' Settlement [1951] 1 Ch. 265 : Infant's application for maintenance—father outside the jurisdiction—question of submission to the jurisdiction.

An infant by his mother as next friend applied for and obtained her appointment as guardian. He asked also for an order for maintenance against his father, who was a United States citizen resident outside the jurisdiction. Without coming to England the father appeared by counsel to oppose this application. Romer J. held that he had no jurisdiction to make the order under Guardianship of Infants Acts, 1886–1925, against the father, as being a person outside the jurisdiction. The infant's appeal was allowed and the case remitted for determination of the question whether the father had submitted to the jurisdiction.

Sir Raymond Evershed M.R.:—

(i) There is a general principle, stated for example by James L.J. in *Ex parte Blain* 12 Ch.D. 522, that English statutes will not be regarded, in the absence of clear language to the contrary, as asserting any jurisdiction outside English territory;

(ii) there is a further, complementary, principle by which a person resident outside the jurisdiction may submit voluntarily to the jurisdiction of the English courts by, for example, coming to this country; but

(iii) no jurisdiction can be conferred upon the courts by voluntary submission or agreement of the parties beyond the limits, if any, set by statute by reference either to persons or to subject-matter; thus the limited jurisdiction of the county courts or the justices' courts cannot be so extended and this was the burden of the decision in *Forsyth* v. *Forsyth* [1948] P. 125, which was concerned with the jurisdiction of such 'inferior courts'; therefore

(iv) ' if upon a fair reading of those statutes (Guardianship of Infants Acts, 1886–1925) it appears that the jurisdiction to award maintenance is intended only to be exercised upon fathers who are English subjects, or English residents strictly so-called, then, I conceive, it would follow (apart perhaps from some matter of estoppel) that an individual who was not . . . could not enlarge the Parliamentary jurisdiction '; upon examination of the statutes, and in particular of the fact that no residence qualification was prescribed for parents where the issue of custody or maintenance was before the High Court, it appeared that ' the statute must be treated like any other statute which contains no special provision in this regard, and therefore that the jurisdiction will be properly enlarged to the extent that if anyone chooses voluntarily to submit to the jurisdiction there is nothing in principle in the Act which prevents a court from exercising that jurisdiction ';

(v) it was therefore for the judge to decide whether here the father had submitted to the jurisdiction.

Bank voor Handel en Scheepvart N.V. v. *Custodian of Enemy Property, and the Administrator of Hungarian Property* (Devlin J., July 30, 1951): Foreign property legislation and lex situs—movables situated in England.

(This note is limited to that part of the facts and judgment which concern the claim against the Custodian.)

The plaintiff bank, incorporated in the Netherlands but wholly owned as to its shares by a Hungarian national, deposited in the normal way of business a quantity of gold with the City Safe Deposit in London. The gold was there on September 3, 1939. On May 20, 1940, the Netherlands became ' enemy ' territory and the bank acquired, and during the war never lost, enemy character; in addition to its property in the gold there was at that date due to it from various banks in London sundry balances amounting to rather more than £17,000. After that date the Royal Netherlands Government, with the consent of the Crown, exercised its sovereign powers from London though the Parliament and Council of State remained in the Netherlands. On May 24, 1940, it issued a decree, known as the A.1 decree, concerning property of persons resident in the occupied Netherlands. The effect of this decree under Netherlands law was to transfer to the State of the Netherlands as from May 24, 1940, the bank's property in the gold bars and in

the bank balances. On July 3, 1940, the Board of Trade transferred the gold bars to the Custodian by vesting order made under Trading with the Enemy Act, 1939, s. 7, and by further order of July 22 gave him power of sale. On July 24, 1940, the Custodian sold the gold bars for the sum of £1,984,120 and retained the proceeds as enemy property; but he took no action at that time on the bank balances, which were not transferred to him until after the end of hostilities. On April 6, 1950, the Administrator of Hungarian Property, pursuant to Article 1 (5) (*e*) of the Treaty of Peace (Hungary) Order, 1948, and having regard to the Hungarian interest involved, required the Custodian to transfer to him the proceeds of sale of the gold bars, and the bank balances. On May 19, 1950, the Netherlands Government by order restored to the plaintiff bank its property taken under the A.1 decree; under Netherlands law the effect of this order was to vest the ownership of the gold and the bank balances in the plaintiff bank as from that date. The plaintiff bank sought to recover the property from the Administrator on the ground that it was not subject to charge [1] and in the alternative claimed against the Custodian for conversion.

The plaintiff bank submitted that the legislation of a foreign State affecting the title of its nationals to movables situated in England will be applied by the English courts unless either the legislation is contrary to public policy—as for example confiscatory or penal legislation—or its application would infringe English legislation; alternatively it was submitted that there is an exceptional class of foreign decrees, which, made by an Allied Power with the approval or acquiescence of the Crown in respect of the property of its nationals in this country, seek to keep that property out of the hands of a common enemy; such decrees will be enforced in England.

Devlin J. :—

(i) 'The substantial question raised is whether the A.1 decree was effective to transfer property situated in this country';

(ii) 'There is little doubt that it is the lex situs which as a general rule governs the transfer of movables when effected contractually. . . . If extraterritorial effect is given to foreign property legislation, it can only be at the expense of English law affecting the same subject-matter.' In this connection there is no authority for distinguishing between common law and statute and, in face of Article 4 of the Custodian Order, 1939, 'the A.1 decree unwittingly snatched the gold from under the

[1] See Treaty of Peace (Hungary) Order, 1948, Article 1 (5) (*g*).

Custodian's hand'; further, foreign legislation is not designed to fit with English law, being founded on a different property law from our own, and in any case it could not defeat the right of the Crown to requisition goods during the war or 'nullify the prerogative right of angary';

(iii) the earlier authorities[2] contain dicta 'which clearly show that the author was relying as part of his reasoning upon the principle of the lex situs, irrespective of the construction of the (foreign) decree or of its confiscatory character. . . . I think it would be surprising if so many masters of the law, all intending to restrict the statement of the principle to confiscatory legislation, no one of them had used in their statement of the principle some words of limitation';

(iv) among recent decisions the plaintiffs relied upon *Lorentzen* v. *Lydden* [1942] 2 K.B. 202 and *O/Y. Wasa Steamship Co.* v. *Newspaper Pulp* (1949) 82 Ll. L. Rep. 936, while the defendants relied upon *El Condado* (1939) 63 Ll. L. Rep. 330, of which the first and third were indistinguishable in principle from the present case. The real ground of the decision in *Lorentzen* v. *Lydden* appears to have been public policy, but so conceived as, first, to create a new head of English public policy; second, to exclude English law in favour of foreign law to which it gave a positive effect it would not otherwise have had; and third, to require the court to consider the political merits of the foreign decree. For these reasons, the reasoning and judgment of the Inner House of the Court of Session in *El Condado* was to be preferred;

(v) as to the plaintiff bank's alternative submission, the Crown's approval of or acquiescence in foreign legislation cannot be inferred by the Court without reference to the appropriate Minister for his instruction on the point; but it would be both unprecedented and wrong for the courts to refer such a question to Ministers of the Crown, for it would in effect give room to the Crown to legislate.

The claim against the Custodian therefore failed.

[2] The learned judge cited *Lecouturier* v. *Rey* [1910] A.C. 262, *per* Lord Macnaghten at p. 265; *Sedgwick, Collins & Co.* v. *Rossia Insurance Co.* [1926] 1 K.B. 1, *per* Sargant L.J. at p. 15; *The Jupiter* [1927] P. 127, *per* Hill J. at p. 145; and *In re Russian Bank for Foreign Trade* [1933] 1 Ch. 745, *per* Maugham J. at p. 767.

Here the lex situs won a pitched battle against foreign law over the transfer of movables in this country; and the decision has rescued the question of enforcement of foreign property legislation from the confusion into which the confiscatory character of decrees, considered in some earlier cases, had brought it. The so-called Russian bank cases, and analogous cases, do not lay down any clear rule that effect shall not be given to foreign property legislation merely because it is confiscatory in character, though they contain some not very precise obiter dicta to that effect. The question must be answered, as it was in the present case, not by reference to public policy or by an attempted appreciation of the quality or purpose of the foreign decree, but by application of the English conflicts rules for the transfer of movables. If the movables are situated in England, it is immaterial whether the foreign decree is confiscatory or not.

Both *Lorentzen* v. *Lydden* and the *O/Y. Wasa Steamship Co. Case* turned on breaches of charterparty and the possession of ships. It is possible that these cases might be distinguished on the basis of the quasi-territoriality of ships; see, for example, Lord Wright's observation in *The Cristina* 60 Ll.L.Rep. 147 at p. 165: 'It must also be noted in the present case that the *Cristina*, even when in Cardiff docks, may have, as being a foreign merchant ship, a different status from an ordinary chattel on land'.

The plaintiff's point about the Crown's approval of or acquiescence in foreign legislation seems to confuse two things: the exercise by an Allied government of its sovereign powers from a place in England upon the Crown's invitation; and the forms and ways in which that power is exercised. Approval of the first obviously is not and does not imply approval of the second. So Wrottesley J. in *Re Amand* [1942] 1 All E.R. 236 at p. 241; 'We are bound to say that the Government of the Netherlands can legislate here for the kingdom and empire of the Netherlands and, to some extent, for Dutchmen wherever they may be. Generally speaking it cannot legislate . . . for persons living in Great Britain to any greater extent than it could do when in the kingdom of Holland. It can legislate as fully as when it was within the territory of that kingdom and, for the purposes of this case, that is enough coupled with what Parliament has done'.[3] That is to say, the Crown's consent and approval went only to the admission to England of the Netherlands Government and the carrying on of its business there; it could not affect the validity or invalidity of that Government's decrees, which were matter for Dutch law.

[3] Allied Forces Act, 1940, s. 1 (1).

Timken Roller Bearing Company v. *United States* (*Supreme Court of the United States*: June 4, 1951). Antitrust laws—restraint of international trade—agreements between U.S. company and foreign subsidiaries.

The United States brought this civil action to prevent and restrain violations of the Sherman Act, 1890, by the appellant, Timken Roller Bearing Company, an Ohio corporation, on the ground that it combined, conspired and acted with British Timken Ltd. and S.A. Française Timken to restrain interstate and foreign commerce by eliminating competition in the manufacture and sale of antifriction bearings in the markets of the world.

The District Court for Northern District of Ohio (Freed J.) found that from 1928 the appellant company and British Timken Ltd., between which there had been business agreements since 1909, combined with S.A. Française Timken to keep continuously operative certain agreements regulating the manufacture and sale of antifriction bearings by the three companies and providing for the use by the British and French corporations of the trade mark 'Timken'; that under these agreements the three companies allocated trade territories between themselves, fixed prices on the products of one sold in the territories of the others, co-operated to protect each other's markets and to eliminate competition, and participated in cartels to restrict imports to and exports from the United States; that the British and French corporations were independent, in their business conduct, of the appellant, both being managed and operated by one Dewar; and that consequently the appellant had violated the Sherman Act as charged. The District Court decreed an injunction to prohibit the continuance of the agreements, and ordered divestiture by the appellant of all its holdings and financial interests in the British and French corporations. The Supreme Court (Mr. Justice Burton and Mr. Justice Clark taking no part in the hearing or decision) upheld the findings of the District Court and the decree of injunction by a majority of five (Chief Justice Vinson, and Black, Douglas, Minton, and Reed JJ.) to two (Frankfurter and Jackson JJ.), but discharged the decree of divestiture by a majority of four (Chief Justice Vinson, Reed, Frankfurter and Jackson JJ.) to three (Black, Douglas and Minton JJ.).

Black J., delivering the judgment of the court:—

(i) The appellant's contentions that the restraints of trade in this case were 'reasonable' and therefore not in violation of the Sherman Act, because they were 'ancillary to legal main transactions', namely, a joint venture between the appellant and Dewar, and an

exercise of the appellant's right to licence the trade mark ' Timken ', must be rejected since

(a) ' the fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws ',

(b) ' the trade mark provisions (in the agreements) were subsidiary and secondary to the central purpose of allocating trade territory . . . the agreements in the present case went far beyond protection of the name " Timken " and provided for control of the manufacture and sale of antifriction bearings whether carrying the mark or not ';

(ii) ' We also reject the suggestion that the Sherman Act should not be enforced in this case because what appellant has done is reasonable in view of current foreign trade conditions. The argument in this regard seems to be that tariffs, quota restrictions, and the like, are now such that the export and import of antifriction bearings can no longer be expected as a practical matter; that appellant cannot successfully sell its American-made goods abroad; and that the only way it can profit from business in England, France and other countries is through the ownership of stock in companies organised and manufacturing there. This position ignores the fact that the provisions in the Sherman Act against restraints of trade are based on the assumption, and reflect the policy, that export and import trade in commodities is both possible and desirable. These provisions of the Act are wholly inconsistent with the appellant's argument that American business must be left free to participate in international cartels, that free foreign commerce in goods must be sacrificed in order to foster export of American dollars for investment in foreign factories which sell abroad. Acceptance of the appellant's view would make the Sherman Act a dead letter in so far as it prohibits contracts and conspiracies in restraint of foreign trade '.

A majority also held that the order for divestiture was unnecessary in the circumstances: ' Prompt and full compliance with the decree (of injunction) should be anticipated '.

Jackson J. dissenting:—

(i) ' It is admitted that if Timken had, within its own

corporate organisation, set up separate departments to operate plants in France and Great Britain, as well as in the United States, that would not be a conspiracy: we must have two entities to have a conspiracy. . . . The doctrine now applied to foreign commerce is that foreign subsidiaries organised by an American corporation are "separate persons" and any arrangement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy. I think that result places too much weight on labels '.

(ii) ' But if we apply the most strict conspiracy doctrine, we still have the question whether the arrangement is an unreasonable restraint of trade or a method or means of carrying on competition in trade. . . . In a world of tariffs, trade barriers, empire or domestic preferences, and various forms of parochialism from which we are by no means free, I think a rule that it is restraint of trade to enter a foreign market through a separate subsidiary of limited scope is virtually to foreclose foreign commerce of many kinds. It is one thing for competitors or a parent and its subsidiaries to divide the United States domestic market which is an economic and legal unit; it is another for an industry to recognise that foreign markets consist of many legal and economic units and to go after each through separate means. I think this decision will restrain more trade than it will make free '.

Frankfurter J. dissented upon similar lines.

The scope of this important decision may perhaps be best seen if two facts are kept in mind: first that the British and French corporations were for practical purposes operating independently of their American parent, and second that the American corporation held a dominant position in the domestic field of roller bearer production so that its agreement with its subsidiaries to divide foreign market territory with them had the effect of eliminating competition in that territory by other *American* firms.

As to the first, the relationship between the three corporations was this: the American parent company held 30 per cent. and Dewar 24 per cent. of the shares in British Timken, the remainder having been sold to the public; Dewar and the American company each held 50 per cent. of the shares in French Timken. Under contracts between Dewar and the American company, the latter was entitled on Dewar's death (which in fact occurred in 1951) to

purchase Dewar's interests both in British and French Timken. On the other hand, the management and operation of the British and French corporations was wholly in the hands of Dewar, free from direction or control by the American company.

As to the second, the Sherman Act declares illegal all contracts, combinations or conspiracies in restraint of trade or commerce among the States and territories of the United States or *with foreign nations*. The dissenting judgments of Jackson and Frankfurter JJ. do not, it is respectfully submitted, meet the point that the mischief in the present case was not the division of foreign market-territory and elimination of competition there, but rather the resulting restraint upon possible exports to that territory by other producers in the United States.

It seems that American corporations must now examine with some care their relations with their European agents and subsidiaries to ensure that the prime objects of their working agreements is not simply the elimination of competition.

Recent Scots Cases

Recent issues of the *Scots Law Times* have contained decisions which will be of interest to students of the conflict of laws. Two of the cases relate to the recognition of foreign decrees of divorce.

McKay v. *Walls*, 1951 S.L.T. (Notes of Recent Decisions) 6

In this case a man whose domicile of origin was in Scotland emigrated to the United States of America in 1923 with the intention of settling there. In 1925 he was married in New York, but in 1926 he deserted his wife and on September 8, 1927, his wife obtained a decree of divorce in the State of Iowa, in which she resided, although at that time the husband was domiciled in New York. In 1950 the wife raised an action in the Court of Session in Scotland to have it declared that she was free to remarry and that the marriage of 1925 had been dissolved. Proof was allowed and evidence was given on commission by a member of the American Bar to the effect that the decision of the Court of Iowa would be regarded as valid in the State of New York and throughout the United States of America. Lord Birnam followed the case of *Armitage* v. *Att.-Gen.* [1906] P. 135, and held that the decision of the Court of Iowa would be recognised by the Scots courts but he dismissed the action as unnecessary on the ground that the pursuer need have no hesitation in entering into a second marriage and that, in the words of Lord Moncreiff, a declarator

of the nature craved in the petition might trespass against international comity.

Warden, 1951 S.L.T. (Notes of Recent Decisions) 26

This was an action of divorce by a husband on the ground of cruelty and in it he averred that he was domiciled in Scotland and had never been domiciled elsewhere. The action was defended by the wife who averred that she was a U.S. citizen by birth, that the marriage took place in America in 1937, that she had obtained a decree of divorce in Nevada in 1947 on the ground of mental cruelty and that, after having obtained the decree, she had entered into a second marriage in America in 1950. In answer the pursuer averred that the decree of the court of Nevada was invalid because it was not a decree of the court of the husband's domicile. The defender contended that in consequence of the passing of the Law Reform (Miscellaneous Provisions) Act, 1949, the domicile of the husband was no longer the only ground of jurisdiction in actions of divorce in the Scots courts and that because section 2 of that Act confers jurisdiction on the Court of Session in cases in which the wife is merely resident in Scotland, the court should concede to foreign courts a jurisdiction based on similar grounds.

The Lord Ordinary (Lord Strachan) sustained the husband's plea of no jurisdiction in the court of Nevada. He therefore held that the foreign decree was invalid and allowed a proof. He observed that the rule of *Le Mesurier* [1895] A.C. 517 that the only competent court in actions of divorce is the court of the husband's domicile still applies except in so far as it has been altered by statute, and he also observed that 'the Act of 1949 extends the jurisdiction of the Court of Session but it makes no provision whatever as regards the recognition of foreign decrees of divorce'. The decision is an interesting postscript to the article by Professor Graveson in 1950 I.L.Q. 371.

Alex Donaldson.

Australian Commentary

Common Law Marriage

A case novæ impressionis, virginal both as regards judicial authority and relevant analogy, is a rare event even in the relatively undeveloped field of the conflict of laws. Such was *Savenis* v. *Savenis and Szmeck*,[1] before the Supreme Court of South Australia. In a divorce suit for adultery it appeared that the petitioning

[1] (1950) S.A.S.R. 309.

husband was born in Lithuania, became a prisoner of war as the result of German military operations and was ultimately transported to work in Bavaria. On November 1, 1945, he went through a ceremony of marriage with the respondent which was officiated by a Roman Catholic priest according to the ritual of that Church, but omitted to comply with the local German requirement of a civil ceremony. In order to substantiate the claim that, despite this evident defect, the marriage was nevertheless valid in point of form, it was alleged that owing to the chaotic conditions prevailing at the time registrars of marriage were unavailable. Thus there was in effect an insuperable difficulty in complying with the lex loci celebrationis, creating a situation which, it was argued, permitted the parties to resort to the forms of their own religion. The decree was granted.

The case raised two issues: First, was the fact situation such as to absolve the parties from conforming to the formalities of the place of celebration? Secondly, assuming an affirmative answer to the first inquiry and bearing in mind that the parties concerned were not British subjects, should our courts uphold this marriage? As regards the first point, the Court stated 'where compliance with the laws of the country cannot be effected because the situation places conformity beyond the powers of mankind, a valid marriage may be contracted, at least by British subjects if celebrated in accordance with the common law'.[2] The finding in the present case that there was such an 'insuperable difficulty' cannot fail to strike a note of some surprise with anyone at all reasonably acquainted with conditions prevailing in Germany at the relevant time, and it is difficult to escape the impression that the Court was all too readily impressed by the testimony of an interested party in an uncontested suit when further investigation would, it is conceived, have furnished information more nearly corresponding to the true state of local conditions. Even if, however, it were conceded that, at the relevant time, a marriage officer was not at hand, did the instant case bear a marked resemblance to *Kent* v. *Burgess*,[3] which decided that mere inability presently to satisfy a residence requirement was not sufficient to enable the parties to contract a valid common law marriage? The judgment uncritically records that 'persons desiring to wed either had to be content with ecclesiastical rites, or to make no attempt to achieve a wedded status. The situation was such that persons like the plaintiff and defendant could not travel to a country where a valid legal ceremony was possible, or if such course was practicable it would at

[2] At p. 311.
[3] (1840) 11 Sim. 361.

least involve incalculable delay'.[4] But was there not a third alternative? The parties might surely have anticipated a speedy return to normal conditions when, once again, along with the indigenous population they could have availed themselves of the regular local marriage procedure?

As regards the purely legal issue, no previous judicial authority has given an indication what law to 'apply' in these circumstances where the parties are not of British nationality. The consensus of juristic opinion is in favour of making the validity of such marriage dependent on the parties' personal law.[5] By this test, the instant petitioner would have failed because it seemed clear that the law of his domicile (as in 1945) insisted on the performance of a civil ceremony, whether regard be had to the law of Lithuania or of the U.S.S.R. None the less, Mayo J. laid down this proposition: 'In circumstances where a marriage cannot be lawfully solemnized in accordance with the laws of some territory owing to chaotic conditions brought about (inter alia) by warfare and if the country in which the parties are, or were formerly, domiciled is itself overrun, the government being taken over by an alien power, then in such a case so far as our courts are concerned I think it would be proper to extend (if it be necessary) the area of legal recognition given to marriages that conform to our common law'.[6]

It is difficult, with respect, to apprehend the legal relevance to the point in issue of the fact that the country in which the parties were domiciled was under foreign occupation or sovereignty. This factor may have some cogency where the parties would, according to our normal rules, have to resort to the judicial agencies of such a state, *e.g.*, to invoke jurisdiction in divorce, but no similar considerations entered the present case. It may be that the annexation of Lithuania has not even received implied de facto recognition by the Australian Government, but the question was not as to a choice between conflicting rules of Lithuanian and Soviet Russian law. Both are at one in requiring a civil ceremony as an indispensable constitutive element in the formation of a valid marriage. The conclusion reached by the Court in effect placed the parties in a more favourable position by reference to the fortuitous Russian occupation of the country of their domicile than would otherwise have obtained, since it was conceded that generally the lex domicilii would have been determinative. In the result, the predication of

[4] At p. 310.
[5] *E.g.*, Dicey, p. 771; Wolff, 1st ed., p. 352; Westlake, § 26; Falconbridge, p. 647.
[6] At p. 311.

validity to the marriage in question on the ground that it had been solemnized in conformity to '*our* common law' was not only a remarkable consequence but furnished a decision which might be regarded as difficult to reconcile with accredited concepts of private international law.

J. G. Fleming.

Persian Gulf Oil Concessions

Developments in science and industry raise questions of interest to lawyers. Oil is an instance of an industry in which the advance made by technicians has set legal problems, municipal and international, which are certainly new and perhaps difficult.

1. It is now scientifically practicable and economically profitable to win oil from under the seabed, either by drilling and pumping operations on the mainland or more directly by planting derricks in the sea, and the right to oil lying under the subsoil of the seabed is a valuable right. Disputes have arisen over the question who has the right to get oil from the seabed of the Persian Gulf. The question raises a number of other questions which admit of different answers. During the years preceding the second World War oil concessions were obtained by companies in the area of the Persian Gulf. Their operations were held up by the war and since the war the world-wide need for oil and the technical advances in getting it from submarine areas have brought other companies in quest of concessions over oil-bearing areas in this part of the world. Are its submarine areas already conceded? If not, can they be made the subject of fresh concessions?

2. To determine whether the submarine areas are covered by the pre-war concessions it is obviously necessary to examine those concessions and the terms of the grant which each has made. The northern and eastern sides of the Gulf are roughly speaking covered by Persia and Irak, the southern and western by Kuwait, Saudi Arabia, the Island of Bahrain, the Peninsula of Qatar, and the six States of the Trucial Coast, Abu Dhabi, Dubai, Sharjah, Ajman, Umm-al-Qaiwain and Ras-al-Khaimah, the seventh being Kalba on the Gulf of Oman. It is over the concessions made with the rulers of some of these States that disputes about oil under the waters of the Persian Gulf have arisen. These concessions were made between companies (mainly British) and the Arab Sheikhs who rule these sparsely populated and primitive countries. The Sheikhs have been in special treaty relations for a century or more with

His Britannic Majesty's Government,[1] which, as the protecting power, exercises extra-territorial jurisdiction by Orders in Council over British nationals in those States, controls the Sheikhs' foreign relations and approves both their concessions and their concessionaries.

3. Various questions arise on the consideration of these concessions, documents in Arabic, or in Arabic and English, approved by the British Government and signed some years before President Truman's Proclamation of 1945 and even before the first Act of State recognising rights to the subsoil of the seabed outside territorial waters in 1942. Are the concessions treaties or analogous to treaties? or simply commercial agreements? Are they to be construed in accordance with International Law? or in accordance with municipal law? If by municipal law, by what municipal law? Islamic? That is the proper law of the Sheikhs who grant the concessions, but is there any Islamic law applicable to commercial transactions of this kind, whether or not they are in any sense analogous to treaties? Or are they to be construed in accordance with English law? Are they to be construed contra proferentem? Or if that canon of construction were applicable to a contract with a Muslim who was a private individual, should a grant by a Muslim Sheikh, who, as a sovereign, is a trustee for his subjects, be construed most strictly against the grantee and most beneficially for him, as it would be for the British Crown, under whose protection he exercises his sovereign powers? And how far if at all should extrinsic evidence of intention, *e.g.*, of the parties' antecedent negotiations or subsequent conduct, be admitted to assist in the interpretation of the text? Only to clear up ambiguity? Or should all the surrounding circumstances, including the background of the negotiators, Eastern no less than Western, be taken into account?

4. The terms of the concessions themselves may give some guidance in deciding these questions, *e.g.*, they may require the concession to be interpreted reasonably or any dispute arising out of it to be decided in accordance with the legal principles familiar to civilised nations. But these rather vague directions leave open for argument the question whether on a reasonable interpretation of the written concession in all the circumstances a Sheikh has conferred on a company the right to get oil from under the sea as well as from under the dry land, and if he has, whether that right extends beyond the territorial waters to the extraterritorial waters above what is now commonly if loosely called the Continental Shelf.

[1] See generally Aitchison—*A Collection of Treaties, Engagements and Sources relating to India and neighbouring countries*, Vol. xi (Delhi, 1933); and 12 & 13 Vict. c. lxxxiv.

5. If a concession makes no mention of territorial waters, are they included in the grant by necessary intendment? Or if a concession mentions territorial waters, does it confer more than a right to use them for access to the coast of the particular Sheikhdom? In either case is the seabed beneath the territorial waters and its subsoil included in the grant? Is any guidance to the right answers to be got from the recognition by Orders in Council of the Sheikhs' jurisdiction over territorial waters, subsequently fixed at the limit of three nautical miles from low water line?

6. The so-called Continental Shelf raises what appear to be different considerations. If on its true construction a concession grants only the right to win oil in an area of dry land, then the whole seabed is outside it, whether inside or outside the 3-mile limit; but if on its true construction it grants the right to win oil by operations not only on dry land but also under the territorial waters, does it also of necessity grant the right to win oil by operations under the extraterritorial waters? The answer seems clearly to depend on the true answers to the further questions:— (a) What is the legal basis of the right to the mineral resources of the Continental Shelf? (b) Does the concession grant rights in a geographical area determined at the date of the concession or does it grant rights in all territory which may be acquired by the grantor or his successors during the life of the concession, *e.g.*, by conquest or cession or accretion? How far is the concession area a political unit capable of expansion and (presumably) contraction or obliteration? If the right is only a right to exploit the area actually ruled over by the Sheikh at the time of the grant, it can only extend to the Continental Shelf if he then had jurisdiction and control over an area of the Continental Shelf. The Sheikhs of the States bordering on the Persian Gulf did not proclaim their title to areas of the Continental Shelf (which were to be determined by agreement with other Governments) until 1949 when they made proclamations authorised by the British Government. Did they by those proclamations merely assert and declare an already existing title? Or did they thereby acquire or annex the area? Even if they had title to it ipso jure before 1949, was occupation necessary to perfect it? If occupation was necessary, were the proclamations effective acts of occupation or is any further act necessary?

7. The nature and extent of the rights of coastal States over territorial waters appear after many years to be ascertained by a reasonable measure of unanimity among States and international lawyers. But is there any such unanimity of view or uniformity of practice in relation to the Continental Shelf? Claims to the

Continental Shelf are a much more recent development, not yet made by all States nor made in the same form. Is it then possible to answer these questions with reasonable certainty at this early stage either from the opinions of international lawyers or from the practice of States?

8. Finally, the physical features of the Persian Gulf raise special problems in working out claims to submarine areas, particularly outside territorial waters. Geologically the whole bed of the Persian Gulf is part of a shelf which does not anywhere drop to anything like ocean depth; and the Continental Shelf cannot be said to end in that area until the deep water of the Gulf of Oman outside the Persian Gulf. The delimitation of the bed of the Persian Gulf presents obvious difficulties, which are not reduced by the many islands, islets, reefs and shoals appearing above the shallow waters of the Gulf. It will be clear from the questions raised in this article that when they are answered by awards in accordance with the arbitration clauses contained in the concessions further questions of no less difficulty may be expected to arise for agreement or decision.

J. F. E. Stephenson.

Foreign Orders of Custody

It may be fairly said that the effect of the Privy Council decision in *McKee* v. *McKee* [1] was to reverse the order in which the court proceeds to decide the issue before it. Whereas in the older cases the court enforced the foreign order subject to its discretion in the matter of the welfare of the child, it now decides what the welfare of the child requires and then gives due weight to the views of the foreign court on the matter. It is submitted that the words of Lord Simonds [2]: 'The order of a foreign court of competent jurisdiction is no exception, such an order has not the force of a foreign judgment, comity demands not its enforcement but its grave consideration' does not carry the law beyond the true position which has always obtained in English law in the past. What, it is submitted, seems so startling, is not so much that a foreign judgment is not blindly followed, but that a disappointed party to custody proceedings can take advantage of his own wrong to re-institute proceedings in another jurisdiction. The advantage is secured not merely by a 'fraude a la loi', but by a criminal device

[1] [1951] 1 All E.R. 1942; see this Quarterly, July, 1951, at p. 384, for a note on this decision.
[2] At p. 948.

of smuggling the child across the border, thereby offending the established law and order of a friendly State.

When, however, all has been said against a decision which opens the door to abduction of children, it is clear that all that the court is trying to do is to preserve the interests of children and it must do it to the best of its understanding. It is submitted that the court rightly cannot be deterred from doing that merely because a parent or a guardian has committed a criminal offence to which the child is neither party nor privy.

In a recent case *Amdo* v. *Amdo* [3] decided by the Supreme Court in Israel the desired social result was achieved, without the necessity of going to the length of denying that the principle of comity does extend to foreign Orders for custody. The interesting feature of the case is that the court was relying on the principles of English Common Law as distinct from the English Statute Law, as they then stood and were understood to apply to the facts of such cases. The facts of the case are summarised from the judgment of the learned President Zmora J.[4] 'The parties who were of French nationality and domicile and of the Jewish faith, contracted a civil marriage in France and in that country went through the Jewish ceremony of marriage. There were two children of the marriage, both infants. In 1949, the mother (who will be called the appellant) instituted divorce proceedings in France and eventually obtained a decree of divorce. The court awarded her the custody of both children. The father (who will be called the first respondent) was to keep the children for one month in the year in the second part of the school vacations. The respondent appealed to a Court of Appeal in France, but the Appeal has not yet been heard. The parties were not divorced according to Jewish law. While the children were with their father, pursuant to the court order, the respondent failed to deliver the children to the appellant and instead proceeded with the children to Israel. The mother followed them and now applies by way of writ of habeas corpus against the first respondent, and against the officer commanding the Immigrant Camp where the children reside, the second respondent, to have the children delivered to her.

The first question before the court was whether the appellant was proceeding on the appropriate remedy in the appropriate court. This is a matter of internal jurisdiction not germane to this Note, yet it is worth pursuing, because it raises in a neat form the classification of the main problem of the case on the conflict plane. The respondent submitted that the question before the court was

[3] 125/49 (1950), Vol. 4 of the Decisions of the Supreme Court.
[4] (3) at p. 6.

an issue of personal status of foreigners, a suit within the jurisdiction of the District Court,[5] not to be determined on habeas corpus in the Supreme Court. The appellant, however, submitted that she was already entitled to the custody of the children by virtue of the guardianship conferred upon her by the French court; all that she was asking for was the recovery of the children from unlawful custody.[6]

Zmora J. said that the argument seemed to him plain common sense even before he turned to the authorities. When, however, he examined them, he found that they establish beyond doubt that habeas corpus was the appropriate remedy for the recovery of infants from unlawful custody. All cases cited and relied on were concerned with violations of the Orders of custody granted by an internal lower court, therefore, apparently, there is no distinction between an Order properly made by a competent foreign court and an Order made by a competent internal court. The court said in the words of Lord Shand that the application ' is not an application in substance to us to determine the question of custody, it is an application to give effect to a foreign judgment upon a matter already pronounced by a court of competent jurisdiction '.[7] It seems then that the classification in the initial stage of choice of jurisdiction and remedies has already revealed what is in the last analysis the ultimate question which the court will have to decide on its conflict of law rules, *i.e.*, whether it enforces a foreign judgment qua foreign judgment, or whether the issue between the parties is still open to litigation.

The next question which fell to be decided was purely a question of the conflict of laws. How far is a court in Israel bound to recognise an Order of custody, incidental to a decree of divorce pronounced by a competent foreign court? The answer is found in Palestine Order in Council, 1922, s. 46, which inter alia incorporates the common law principles into the law of Israel. The court then proceeded to quote Dicey on the *Conflict of Laws* (6th ed., 1950) to the effect that any right which has been acquired under the law of a civilised country which is applicable according to the English rules of the conflict of laws is recognised, and generally enforced by English courts (Rule 1, p. 11). In particular the court cited Comment on Rule 71 and Illustration 5 to the same, which is based on the case of *Radoyewitch* v. *Radoyewitch*. The court also referred to Rule 93, at p. 431, which is in turn based

[5] Ss. 64 and 51 of Order in Council, 1922.
[6] S. 7 Courts Ordinance.
[7] *Radoyewitch* v. *Radoyewitch* 1930 S.C. 619.

on the same case, and on *Re McKee*.[8] The court did not refer, however, to Rule 117 and footnote 65 thereto.[9]

It is submitted that the wording of the above Comments and Illustration no longer accurately states the legal position in England and they must be modified to present the law as pronounced in *Re McKee*.

It may seem at first sight surprising that the case in *Re B's Settlement* was neither cited nor commented upon by the Israeli court.[10] The answer seems to be that it was the general and accepted view that the case was decided on the basis of an English statute[11] and as such not law in Israel. It seems now 'that too much stress should not be laid upon the provisions of the Guardianship of Infants Act, 1925, section 1 of which introduced no new principle of law, but merely enacted the rule which had long been acted on in the Chancery Division of the High Court of Justice (see *Re Thain*)'.[12]

The learned judge then disposed of two subsidiary questions and came to the conclusion that neither the fact that the respondent was appealing in France, nor the fact that the parties were not divorced according to Jewish law, would deter the court from giving effect to the French judgment.

A third question with which the court was faced, was the paramount consideration of the welfare of the children. That raised a matter of fact for the court's determination. The court having considered all the relevant factors came to the conclusion that the material advantages which the mother, a secondary school teacher, could offer them in Paris by way of home and education, coupled with the affection, love and care of the maternal grandparents, outweighed all that the father could give to the children at the moment. He was an immigrant, a medical practitioner, but he was unemployed and lived with the children in an immigrant camp. All that he could offer to the children in the near future were hopes and plans.

The last straw to which counsel for the respondent sought to cling was the doctrine of public policy. He stated that it is contrary to the declared public policy of Israel to send away Jewish children from its own shores back to the Diaspora. To that the President replied[13]: 'And as to the doctrine of public policy, this

[8] C.A.O. 1948, 4 D.L.R. 339.
[9] 'The matter is really of Public law and not of civil rights and foreign law and is therefore inapplicable'.
[10] Nor was *M'Lean* v. *M'Lean* 1947 S.C. 79.
[11] Cheshire, *Private International Law*, 3rd ed., at p. 538.
[12] [1926] Ch. 676, at p. 949.
[13] At p. 21.

court and every judge in Israel would rejoice in every Jewish child who is brought to this country to receive his education and live here, but that is not the way to ingather Jewish children into Israel. Let us not turn our country into a haven for people who through rifts in their families smuggle children contrary to law and order. No good can come this way either to the children or to the country '.

The other members of the court concurred, though two of them took a different view of the evidence, and the court therefore made the decree absolute.

A few words may be said concerning the difference in approach of the two courts, in considering the matter. The court in *Amdo* v. *Amdo* emphasised the importance of the universal recognition of judgments in rem and incidental matters decided thereunder rendered by the competent court. Though in a proper case the court will override the decision of a foreign court where it considered it necessary for the welfare of the child, the court hastened to add: '. . . but even on the question of the welfare of the children, the court will not lightheartedly depart from the decision of a foreign court on the right of custody. It is clear, however, that each case must be decided on its merits, one cannot lay down a general rule. Yet one has to presume, generally, that the foreign court had more factors on which to base a decision on the issue than the court in another country, who later on is being asked to recognise the judgment given abroad '.[14]

The Privy Council, on the other hand, felt differently both on the question of jurisdiction and on the question of recognition. ' Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an Order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question (of the children's welfare) although in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case ',[15] and later on ' it is the law of Ontario (as it is the law of England) that the welfare of the infant is the paramount consideration ' in questions of custody. To this paramount consideration all others yield, the Order of a foreign court of competent jurisdiction is no exception. Such an Order has not the force of a foreign judgment; comity demands not its enforcement but its grave consideration '.[15]

[14] At p. 20.
[15] At p. 948.

In the majority of cases it may be said that for practical purposes this difference in approach matters little. It is, however, submitted that it is of decisive importance in a borderline case. Would the court in Israel have made the Order which they did had the circumstances of Dr. Amdo, both material and social, been different? On careful reading of the observations of Zmora J. and his brethren it is submitted that at least three out of five judges would have decided the case as they did. It is in the nicely balanced case that the difference in approach is so well noticed in the final result. For there the theoretical considerations of what in effect the court is doing tend to sway the balance. It is submitted therefore that in the evenly balanced case the Court of Israel would feel its discretion on the question of what is good for the child, fettered by a foreign judgment which they seek to enforce. On the other hand, on the true reading of the advice in *McKee*, it is submitted that in an evenly balanced case the court in England would feel its hand free and discretion unfettered by a foreign judgment or decree. It may be that it was against the possibility of such a delicate situation that A. B. Keith exhorted the English court, for sake of comity though not on legal grounds, not to abandon the theory that the court is enforcing a foreign judgment in matters of custody. To the legal argument *McKee* served the coup de grace, but the moral, however, is still there.

E. Likhovski.

The Soviet-Persian Treaty of 1921

The present political and economic state of Persia may draw an old skeleton out of its cupboard—the treaty made by that country with the R.S.F.S.R. in 1921. Are its provisions obsolete or are some still enforceable? What is the Soviet Union permitted under it to do? Is it qualified in any way by the United Nations Charter?

The treaty was signed in Moscow on February 26, 1921, and ratifications were exchanged in Teheran exactly one year later: it was to be of indefinite duration. Some of the provisions were of an administrative or ephemeral character and it is Articles IV, V and VI which are of present concern. In Article IV the two countries undertook not to interfere in each other's domestic affairs. In Article V they undertook to prevent 'the formation or residence in their respective territories of organisations or groups, of whatever name, or of individual persons, whose intention may be to fight

against Persia or Russia '; not ' to import into, or transport through its territory anything that may be used against the other '; and to take ' all means to prevent the sojourn . . . of an army or armed forces of a third country, if the sojourn of such forces may threaten the frontier, or the interests of, or the order in, the country of the other '. Article VI reads as follows : ' The High Contracting Parties agree that in case any third countries intend to pursue a policy of transgression in Persian territory, or to make Persian territory a base for military attacks against Russia, and if thereby a danger threatens the frontier of Soviet Russia, or its federated associates, and if the Persian Government, after having been notified by the Soviet Government, is not able to remove this danger itself, the Soviet Government shall have the right to send its army into Persia in order to take the necessary military steps in its own defence. The Soviet Government undertakes to withdraw its army from Persia as soon as such danger is removed '. When the question of ratification came before the Mejlis there was much dissatisfaction with the large scope and vague wording of Articles V and VI and the Persian Government was asked to get some reassuring clarification from the Soviet Government. An agreed interpretation was accordingly embodied in an exchange of notes between the two Governments on December 12, 1921, which read : ' Articles V and VI are intended to apply only to cases in which preparations have been made for a considerable armed attack upon Russia or the Soviet Republics allied to her by the partisans of the régime which has been overthrown or by its supporters among those foreign powers which are in a position to assist the enemies of the Workers' and Peasants' Republics and at the same time possess themselves, by force or by underhand methods, of part of Persian territory, thereby establishing a base of operations for any attacks—made either directly or through counterrevolutionary forces—which they might meditate against Russia or the Soviet Republics allied to her '.

The Treaty was confirmed and amplified by a further Treaty of Non-aggression and Neutrality ratified in Teheran on January 31, 1928. Of this treaty, Article I declared that all the provisions of the earlier instrument remained in force; Article II called for ' neutrality in case of aggression against either by one or more third powers ', but a protocol provided that this article should not apply ' to the cases provided for in Article VI of the 1921 Treaty or to the commentaries on that Article '. Finally, Article III forbade the contracting parties to take any part ' whether de facto or de jure in political alliances or agreements directed against the safety of the

territory or territorial waters of the other High Contracting Party or against its integrity, independence or sovereignty' or in any economic blockades or boycotts of the other.

Insurance against what may be called political aggression is a motif of nearly all the Soviet defence treaties with its neighbours and with other powers,[1] but Articles V and VI of the 1921 Treaty and the explanatory note are designed to meet a *military* threat to Russia; and the right of the Soviet Government to send its army into Persia arises only where (i) preparations have been made for a considerable armed attack upon the U.S.S.R.; (ii) by partisans of the Tsarist régime; or (iii) its supporters among foreign powers, which by some means possess themselves of part of Persian territory.

It seems reasonable to hold that the provisions of Article VI, read in the light of the so-called 'commentaries' upon it, have expired by exhaustion of the conditions they were designed to meet. The Tsarist régime and its supporters, still a present danger in 1921, have been long broken and scattered, and even the present activities of Kerensky and his followers could not of themselves bring Article VI into operation. But there is nothing in the explanatory note which requires that the preparations for an armed attack upon the U.S.S.R. must be going forward in *Persia* and—however disingenuous the argument might seem to be—the U.S.S.R. might, if condition (iii) were satisfied, associate such movements with Western rearmament and seek by Article VI to justify the occupation of northern Persia.

But are these provisions of the 1921 Treaty qualified or overruled by the United Nations Charter? The following articles of the Charter appear at first sight to be relevant and may be considered together: Articles 2 (4), 39, 51, 52 and 103. Let us suppose for sake of argument that the conditions, set out in Article VI and the explanatory note, materialised; could the Soviet Union then rely upon any of these articles to justify the sending of troops into Persia or do any of them prevent her from doing so? It might be said, first, that the 1921 Treaty provisions constitute a 'regional arrangement' within the scope of Article 52; but even so there are Charter limitations upon it. For the words in Article 52 (1), 'Nothing in

[1] *Afghanistan*, ratified at Kabul on April 10, 1927, each country forswore any steps likely to cause 'political or military injury' to the other, and any part in political or military alliances directed against the other, and undertook to prevent 'the inception of hostile actions or policy by third persons in its territory'; *Turkey*, ratified in Istanbul on June 29, 1926 (similar provisions). Recent treaties of the U.S.S.R. with *Czechoslovakia* (December 12, 1943, Article V), other countries in Eastern Europe, *France* (Treaty of Alliance, December 10, 1944, Article V) and the *United Kingdom* (Treaty of Alliance, July 4, 1942, Article VII) forbid participation by either contracting party 'in any alliance or coalition directed against the other'.

the present Charter precludes the existence of regional arrangements . . .' are deceptively wide since regional arrangements must conform with Articles 1 and 2 of the Charter and the Security Council is not precluded, by reason of Article 52 (4), from investigating a 'regional' dispute even though a regional arrangement already covers it. Further, the sending of Soviet troops into Persia would, on this view and to the extent that they were directed against the forces or intervention in Persia of a third power, be 'enforcement action' requiring the authorisation of the Security Council under Article 53 (1). 'Enforcement action' taken within the scope of a regional arrangement without such authorisation could be declared a breach of the peace under Article 39.

Entry of Soviet troops into Persia could be justified under Article 51 if an armed attack on Persia or on the Soviet Union from Persia had actually taken place; but if the doctrine that the right of collective self-defence includes the right to make defence preparations is accepted, then the language of Article 51 appears to widen the 1921 Treaty provisions by excluding the operation of Article 2 (4). Though Article 2 (4) by itself appears to nullify the right of the Soviet Union to enter Persian territory, the right is preserved if it is open to the Soviet Union to argue that the suppression of a foreign force in Persia is either defence against armed attack on Persia or a step in the defence of the Soviet Union against such armed attack, thereby bringing into operation the general introductory words to Article 51.

Article 103 seems not to apply. It is unsatisfactorily worded in its dealing only with 'obligations'. Under the 1921 Treaty provisions, with which we have been dealing, Soviet rights are in issue; the obligations in the case rest on Persia. Soviet rights are limited if at all by Article 2 (4) while there appear to be no Charter obligations overriding Persia's 1921 treaty obligations.

Jacob Tapp.

Legal Aid in Civil Proceedings for Persons Abroad

Legal Aid and Advice Act, 1949, s. 2 (1) provides that '. . . legal aid shall be available for any person' who satisfies the prescribed financial conditions, and, in case it should be doubted that the words 'any person' mean 'any person wherever resident' Regulations 3 (1) (*b*) and 4 of the Legal Aid (General) Regulations, 1950, make express provision for application for civil aid certificates by

persons resident 'outside England and Wales' and 'outside Great Britain'.[1]

A person desiring a civil aid certificate [2] who is resident outside England and Wales, must apply to the Local Committee for London, but in other respects the same rules and conditions apply to him as to applicants resident in England and Wales. If, however, he is resident outside Great Britain,[3] and unable to be present in Great Britain while his application is being considered, there are further requirements :—

(i) his application must be in English;

(ii) his application must be sworn

(a) if he is resident in the British Commonwealth or the Republic of Ireland, before a person authorised by law to administer oaths;

(b) if he is resident in a foreign country before a consular officer of the United Kingdom or person authorised to exercise the functions of such a consular officer;

(iii) his application must be accompanied by a written statement by a responsible person of his own knowledge of its accuracy in respect of the capital and income of the applicant;

(iv) the applicant must undertake to defray on demand the expenses of any preliminary inquiries which the Law Society may make as a result of the application.

These are the only provisions in the Act of 1949 and the Regulations relating specifically to the case of an applicant resident outside England and Wales, and it will be seen that the scheme is open to such persons without regard to nationality and without more special conditions [4] than are necessary to ensure proper and economical administration of the Scheme and the Legal Aid Fund.

[1] For the benefit of foreign readers it may be explained that for legal usage the geographical names and titles of the various parts of the British Isles have been fixed largely by statute as follows:—

'England' includes Wales and Berwick-on-Tweed: Wales and Berwick Act, 1746, s. 3, and these are together known as 'England and Wales';

'Great Britain' is England and Wales and Scotland: Union with Scotland Act, 1706.

'United Kingdom' comprises Great Britain and Northern Ireland: Royal and Parliamentary Titles Act, 1927, s. 2 (2).

The 'British Islands' comprise the United Kingdom, the Channel Islands and the Isle of Man: Interpretation Act, 1889, s. 18 (1).

For example a person resident 'outside England and Wales' may be resident in Scotland, Northern Ireland, the Channel Islands, the Isle of Man, or elsewhere.

[2] The provisions of the Act at present in force are largely confined to civil proceedings.

[3] A resident of Scotland unable to be present in Great Britain does not appear to have to meet these requirements.

[4] The Act does not of course qualify in any way any rules of English law which require residence as a condition of instituting proceedings in the courts.

It is clear, however, that when such applications come in fact to be considered, and such persons become assisted litigants, new problems will arise. The assessment of disposable income, for example, may present difficulties in the case of an alien resident abroad, and it may be necessary to take special steps to prevent abuses, since it may be impossible in such a case to give effect to many of the Act's punitive provisions; however the appropriate Area Committee has a strong weapon in its power to discharge or revoke a certificate.[5] Further, when litigation has commenced, such questions as orders for security of costs and orders for payment of costs against 'assisted litigants' abroad will arise.

It may, however, be useful to point out on the question of costs generally, that section 1 (7) (*b*) of the Act of 1949 provides that the rights conferred by it upon an assisted litigant are not to affect the rights and liabilities of other parties to the proceedings, or the principles on which the discretion of any court or tribunal is normally exercised.

In *Daley* v. *Diggers, Ltd.* [1951] 1 All E.R. 116, Hilbery J. construed this to mean that the court is to disregard the fact that a party is an assisted person when considering how to exercise its discretion. However, as far as security for costs is concerned, the Court of Appeal in *Conway* v. *George Wimpey, Ltd.* [1951] 1 All E.R. 56, refused to order security against an assisted person, while recognising that section 12 (2) (*b*) of the Act of 1949 contemplated such an order in certain cases to be prescribed for by regulation.[6] It may be that the case of the assisted person resident abroad will be one in which the Lord Chancellor may find it desirable to exercise his rule-making powers under that section.

The structure of the Act and Regulations is to provide a framework within which a workable and just scheme may be formed as practice and experience indicate, and the problem of the assisted person resident abroad will have to be solved on these lines.[7]

J. D. Keir.

Patents: The Search for Novelty by the International Institute of Patents

The inauguration of the International Institute of Patents at The Hague in June of last year has gone practically unnoticed in this

[5] Regulation 11 of 1950.
[6] By the Lord Chancellor.
[7] See generally *Legal Aid*—Eric Sachs, K.C. (Eyre and Spottiswoode, 1951, p. 466: 36s.).

country.[1] This may be due to the fact that the United Kingdom is not a party to the agreement which was signed by the representatives of Belgium, France, Luxemburg and the Netherlands on June 6, 1947.[2] The comparative lack of interest which has been shown in the establishment of the Institute is regrettable for, as will be seen from the remarks which follow, it is an important step in the direction of facilitating the exploitation of inventions in foreign countries. While it may be true that the Bureau international pour la protection de la propriété industrielle, which was set up at Berne in 1883, provides an international service of legal documentation of the greatest value to all countries members of the International Conventions on the Protection of Industrial Property, there has not as yet existed an international service conducting searches into the novelty of inventions. To facilitate such search on an international scale is the task of the new Institute.

I

Article 1 of the Agreement of June 6, 1947, provides that search may be applied for in respect of inventions whether or not they are the subject of applications for patents in member countries; and art. 1 of the rules of procedure governing applications for search, extends the competency of the Institute to inventions for which patents have already been granted.[3] Although the rules only refer to inventions which are patented or are the subject of patent applications, it is clear from the general tenor of art. 1 of the Agreement that inventions which do not fall within either of these categories are within the competency of the institute.[4]

At present search will be confined to ascertaining whether an invention is new in relation to what is already known in one or more of the four countries parties to the Agreement. This limitation does not necessarily follow from the text of the Agreement. But it is

[1] The Institute which is known as 'l'Institut international des brevets' was formally opened on June 14, 1950; the address is 97 Nieuwe Parklaan, The Hague.

[2] See 'l'accord relatif à la création d'un bureau international des brevets' reproduced in Propriété Industrielle 1949, pp. 105–106, and hereafter to be referred to as 'Agreement'.

[3] See 'règlement concernant l'application de l'Accord de La Haye, du 6 juin 1947' reproduced in Propriété Industrielle 1951, pp. 38–40, and hereafter to be referred to as 'Rules'.

[4] See also art. 1 (2) of the Rules which provides that the Institute 'undertakes all research and investigation relating to technical development, and generally all work within the framework of the duties devolving upon it by virtue of this Agreement'.

clear from art. 2 that search cannot be conducted into what is already known in non-member countries because the duty to provide the Institute with the requisite material must necessarily be confined to member governments and cannot be extended to third parties. If, on the other hand, non-member governments voluntarily put material at the disposal of the Institute, the latter is entitled to extend the search to such material. Moreover, art. 11 of the Agreement provides that other countries which are members of the International Union for the Protection of Industrial Property may accede to the Agreement at any time by notifying the government of the Netherlands.[5]

II

The following are entitled to submit applications for search of novelty:

(a) Nationals of one of the countries parties to the Agreement, irrespective of whether or not they have their domicile or place of business in one of these countries;

(b) All persons domiciled in one of the countries parties to the Agreement, irrespective of whether or not they are nationals of one of these countries;

(c) All persons who have effective business establishments or industrial undertakings in the territory of one of the member countries;

(d) All companies who have their registered offices or effective business establishments or industrial undertakings in the territory of one of the member countries.[6]

An invention which is the subject of an application for the grant of a patent can only be submitted to the Institute if the application is pending in one of the member countries. An invention, on the other hand, for which a patent has already been granted can be submitted, irrespective of whether the grant has been made in a member country or elsewhere.[7] But whereas the Institute gives an 'opinion' (avis) on the novelty or otherwise of inventions for which patents have been granted or are pending in member countries the position with regard to patents registered in non-member countries seems somewhat doubtful. The rules provide in art. 8 that applications in respect of inventions patented in non-member

[5] It is not known whether countries other than the original signatories have yet signified their assent to become parties to the Agreement.

[6] Cf. Rules, art. 2.

[7] *Ibid.*, art. 8.

countries ' are deemed to be research and investigation within the meaning of art. 1 (2), and therefore, as regards the fee payable, subject to the provisions of art. 26 '. It would appear that this provision is confined to the question of fees, and the incongruous use of the words ' research and investigation ' in relation to applications instead of in relation to the work which is undertaken by the Institute upon receipt of an application makes little sense and would seem to suggest that it is the duty of the Institute in all cases to give an opinion in the strict sense of the word.

III

Any requests to the Institute for an opinion must be submitted by the applicant through the agency of the Patent Office of the member country concerned,[8] and the opinion of the Institute is likewise transmitted to the applicant through the agency of that Patent Office.[9] But the applicant may, subject to the approval of the national Patent Office, himself conduct all relevant correspondence with the Institute.

In addition to setting out the relevant particulars of the invention or of the patent, as the case may be, the request must contain the relevant facts which entitle the applicant to submit his request (by reason of his nationality or domicile), the date of priority claimed (if any), and the capacity in which he acts. The request must be submitted in the official language or languages of one of the member countries, but all documents in support of the request may also be submitted in English.[10]

Upon receipt of the request the Institute conducts a search into the novelty of the invention. As a rule the search for novelty will be extended to a date prior to the filing of the application for a patent, or, upon request, to any other date from which priority is claimed.[11] Upon completion of the search a provisional opinion (avis provisoire) is transmitted to the applicant who may, within six months from the date of receipt, transmit his observations in writing. The Institute will then give its final opinion (avis definitif) in the light of the applicant's observations, or, failing such observations, will give its final opinion upon the expiration of six months from the date of the provisional opinion.[12]

[8] See art. 3 of the Rules.
[9] *Ibid.*, art. 17.
[10] *Ibid.*, arts. 9 and 11.
[11] *Ibid.*, arts. 14 and 19.
[12] *Ibid.*, art. 21.

IV

Only experience will show whether the Institute is likely to justify the hope which its sponsors have placed in it. For the present limitations of a geographical nature may circumscribe its work. But once an even modest degree of universality has been achieved, the scope and prestige of the Institute will grow. Even now it is possible to submit for search inventions patented in non-member countries, and if such countries are willing eventually to place material at the disposal of the Institute, its field of activity will grow more rapidly than is likely at present. If more countries decide to accede to the Agreement, the day may even come when, as between member States, the opinions of the Institute on the novelty of inventions will be accepted as conclusive.

Less than seventy years have passed since the coming into operation of the Paris Convention, and much has been achieved since then. The establishment of the new Institute at The Hague is a further important step towards closer co-operation in the mutual protection of rights of industrial property, and the four countries which have sponsored this development are certain to derive considerable benefit from their initiative.

F. Honig.[13]

International Air Law

McGill University has announced the establishment in its Faculty of Law at Montreal of an Institute of International Air Law. Its purpose is to provide facilities for advanced study in international air law for qualified law graduates and also an academic organisation for fundamental research in this field. The Institute will doubtless gain much from the presence of I.C.A.O. and of the head office of I.A.T.A. in Montreal.

Courses of study will include international transport law; public international air law; private international air law; and international air regulation. Optional courses will be available in the following complementary subjects: international trade; principles of maritime law; principles of civil law; transportation; international relations; and diplomatic history.

Professor John Cobb Cooper, of the Institute for Advanced Study, Princeton, New Jersey, U.S.A., is Director of the new Institute and an advisory committee, with an international membership, has been appointed. It has two members from the United Kingdom: Major K. M. Beaumont and Mr. Richard O. Wilberforce.

[13] Barrister-at-Law.

The Inter-American Council of Jurists

This body was created by Article 57 of the Charter of the Organisation of American States, which was signed at the Ninth International Conference of American States, held at Bogotá in 1948.[1] Its purpose is 'to serve as an advisory body on juridical matters; to promote the development and codification of public and private international law; and to study the possibility of attaining uniformity in the legislation of the various American countries, in so far as it may appear desirable' (Article 67). It replaces a number of codification agencies set up by previous Inter-American Conferences. It is composed of one jurist from each State Member of the Organisation (Article 59) and it meets when convened by the Council of the Organisation (Article 72). It is assisted by the Inter-American Juridical Committee of Rio de Janeiro, which is the permanent committee of the Inter-American Council of Jurists. (Article 68). The Inter-American Juridical Committee is composed of the jurists of nine countries only. These are chosen by the Inter-American Council of Jurists from a panel submitted by each of the nine countries chosen by the Conference of American States (Article 69). The Inter-American Juridical Committee is to undertake 'such studies and preparatory work as are assigned to it by the Inter-American Council of Jurists, the Inter-American Conference, the meeting of Consultation of Ministers of Foreign Affairs, or the Council of the Organisation. It may also undertake those studies and projects which on its own initiative it considers advisable' (Article 70). Both the Inter-American Juridical Committee and the Inter-American Council of Jurists are to seek the co-operation of national committees specializing in the codification of international law and of institutes of international and comparative law (Article 71).

The Inter-American Juridical Committee, whose permanent seat is at Rio de Janeiro, is the successor of the Inter-American Neutrality Committee. This latter body was set up by the First Meeting of Consultation of Ministers of Foreign Affairs of the American Republics, held at Panamá in 1939. Its name was changed to Inter-American Juridical Committee by the Third Meeting of Consultation of Foreign Ministers, held at Rio de Janeiro in 1942, which entrusted to it, among other duties, the task of 'developing and co-ordinating the work of codification of international law without prejudice to the competence of existing agencies'. Apart from its work on neutrality questions, the

[1] For the text of this Charter see *Department of State Bulletin*, vol. xviii. No. 464 (May 23, 1948), pp. 666–673.

Committee prepared a number of drafts for the Bogotá Conference, some of which were adopted by the Conference. These related to the Inter-American peace system, to the international rights and duties of man and to a charter of social guarantees. For a Secretariat the Inter-American Council of Jurists has the services of the Department of International Law and Organisation of the Pan American Union, of which Mr. Charles G. Fenwick, well known as a contributor to the American Journal of International Law and a member of its board of editors, is director, whilst the secretary and staff of the Inter-American Juridical Committee come from the staff of the General Secretariat of the Organisation of American States.

Because of the tradition whereby Rio de Janeiro was already regarded as a centre of the attempts to codify Inter-American law, the city was chosen as the venue for the first meeting of the Inter-American Council of Jurists which lasted from May 22 to June 15, 1950. The agenda of the meeting had been prepared by the Pan American Union in co-operation with a special committee of the Council of the Organisation of American States. It was approved by the Council of the Organisation on June 22, 1949, and submitted to the Member Governments and to the Inter-American Juridical Committee for observations. Background material to the agenda was contained in an elaborate handbook, prepared and issued by the Department of International Law and Organisation of the Pan American Union. The opening session of the meeting was attended by delegates of all the American Republics except for Bolivia, Costa Rica and Haiti. Costa Rica, however, allowed herself to be represented at a later stage by one of the assistant delegates from Uruguay, whilst Haiti sent an observer. Dr. Francisco Luis da Silva Campos (Brazil) was elected chairman and Dr. Raúl Sapena Pastor (Paraguay) vice-chairman. The chief delegate of the United States of America was Dr. William Sanders, whilst El Salvador marked the importance of the occasion by sending her Minister of Foreign Affairs, Dr. Miguel Rafael Urquia.

The most important business of the meeting was to adopt the draft statutes of the Inter-American Council of Jurists and the Inter-American Juridical Committee for submission to the Council of the Organisation of American States. It was decided, for instance, that the Inter-American Council of Jurists should co-operate with corresponding organs of the United Nations, but only in agreement with the Council of the Organisation of American States; that, during the interval between meetings of the Inter-American Council of Jurists, the members of that Council should be kept informed by the Inter-American Juridical Committee of the progress of the latter's work; that the interval between meetings

of the Inter-American Council of Jurists should not exceed two years unless so decided by the Council of the Organisation; that the place of the meetings should be decided by the Inter-American Council of Jurists at their last meeting and that the date of the meetings should be fixed by the Council of the Organisation after consultation with the Government of the country in which the meeting was due to be held; that each Member State should have one vote and that resolutions should be adopted and decisions approved by a simple majority vote.

Among the resolutions passed at the meeting was one paying tribute to the work of the Pan American Union and another transmitting greetings to the Council of the Organisation of American States. A vote of thanks was passed to the Government and people of Brazil and it was decided to hold the next meeting of the Inter-American Council of Jurists in Buenos Aires. It was also resolved to transmit without comment to the Inter-American Economic and Social Council a draft agreement on the elimination of passports and the establishment of an American identification certificate not requiring consular visas and fees, which had been drawn up by the Inter-American Juridical Committee, and to continue at the second meeting of the Council the consideration and study of the problem of recognition of *de facto* governments. A report of the Inter-American Juridical Committee stating that the preparation of a statute of an Inter-American court to protect the rights of man 'would necessarily imply a radical change in the constitution systems in force' was approved. It was further agreed that the right of resistance to oppression and tyranny 'is not yet recognised in the international juridical order, and the latter does not have at its command adequate means to protect the exercise thereof'. On the scope of the powers of the Organisation of American States, it was decided that it would be useful if the Inter-American Council of Jurists were to discuss this question at its next meeting. With regard to codification, which is after all the *raison d'être* of the Council of Jurists, it was resolved that the Council should select those matters which it considers 'susceptible of development, codification, or study' and should take into account the recommendations of the Inter-American Juridical Committee, but that priority should be given to matters the study of which had been requested by the Inter-American Conference, the Meeting of Consultation of Ministers of Foreign Affairs or the Council of the Organisation. Similarly the Inter-American Juridical Committee would either act on its own initiative or study matters determined for it by the superior bodies. On this basis the Council of Jurists recommended the Juridical Committee to study the possibility of effecting a

uniform codification of Inter-American private international law, to consider the codification of the law of territorial waters and related questions as well as the law of nationality and statelessness,[2] and to aim at uniformity of legislation in such matters as aid and rescue, collision, immunity of public vessels, sales of personal property, international commercial arbitration and international co-operation in judicial procedures. It was also agreed to co-operate closely with the American Institute of International Law and with the International Law Commission.

The most ambitious task aimed at by the Inter-American Council of Jurists is undoubtedly the preparation of a single code of private international law. At present there are three codes in force. First, there is 'The Restatement of the Law of Conflicts of Law' drawn up by the American Law Institute of the United States of America by which the courts of that country are largely influenced. Secondly, there is 'The Code of Private International Law' (Bustamente Code) approved by the sixth Pan American Conference held at Habana in 1928, but so far ratified only by the following countries: Cuba, Panamá, Dominican Republic, Brazil, Peru, Guatemala, Haiti, Costa Rica, Nicaragua, Honduras, Chile, Bolivia, Venezuela, Ecuador and El Salvador. Thirdly, there is the system of the Montevideo Treaties, approved by the South American Congresses of Private International Law held in that city in 1888–1889 and 1939–1940, and in force in Argentina, Uruguay, Paraguay, Colombia, Peru and Bolivia, although Peru and Bolivia also ratified the Bustamente Code. The most important difference is that whereas, under the Montevideo Treaties and the Restatement, the law of capacity of persons is that of the domicile, under the Bustamente Code capacity depends on the personal law, which is either the national law or the law of the domicile, according to the law of each country. Moreover, the effects of contracts are governed, according to the Bustamente Code and the Restatement by the *lex loci contractus*, whereas the Montevideo Treaties apply the *lex loci solutionis*. Other important differences concern the law of succession and the extraterritorial juridical personality of commercial companies. Despite these difficulties, the Department of International Law and Organisation of the Pan American Union claim to be optimistic about the possibility of arriving at an agreed code. They argue that attempts at codification of private international law in Europe have failed because they have been piecemeal, tackling only special matters such as marriage, divorce,

[2] These were the very subjects selected for the largely unsuccessful Codification Conference held at The Hague in 1930.

guardianship and bills of exchange, instead of going to the roots of the problem.

The Inter-American Council of Jurists are only at the beginning of their labours, but certainly their efforts will be watched with interest in Europe.[3]

D. J.

[3] It may be helpful to draw the attention of British readers to certain recent publications dealing with inter-American juridical affairs, including the following:—

(i) *The Inter-American Juridical Yearbook.*
The first issue appeared in September, 1950. It is a 400-page volume containing a survey of all significant developments in inter-American juridical relations, including the texts of the Treaty of Reciprocal Assistance and the Charter of Bogota. A second issue is now in the press.

(ii) *Annals of the Organization of American States.*
This quarterly appears in English, Spanish, Portuguese and French. Started in March, 1949, it provides a continuous documentary record of the work of the Organization.

(iii) *Statements of Laws Affecting Business in Latin America.*
This valuable series, which appears in English only, is designed primarily to assist United States businessmen doing business in Latin America. A separate volume is devoted to each Latin American country, and each volume contains a summary of legislation on nationality and immigration, rights and duties of aliens, formation and operation of commercial undertakings, taxation, social problems, industrial property and exchange and import controls. Sixteen countries are already covered by the series and, as the volumes on Guatemala and Panama are nearing completion, only El Salvador and Paraguay remain to be covered. The volumes have been found so useful that already revised editions in respect of some countries are being prepared.

(iv) *Copyright Protection in the Americas under national legislation and inter-American treaties.*
A new edition of this study, first published in 1943, has just been prepared.
Among the publications prepared by the Division of Legal Affairs of the Department of International Law and Organization of the Pan American Union, mention should be made of *Bilateral Treaty Developments in Latin America* (a record of treaties, conventions and other agreements entered into by the countries of Latin America during the period 1938–1948); the revised edition of the bi-annual publication *Status of the Pan American Treaties and Conventions*; and also of the *Handbook* prepared for the First Meeting of the Inter-American Council of Jurists (to which reference was made in our last issue) as well as the Final Act of that meeting and the report of the Executive Secretary.

BOOK REVIEWS

Recent Trends in the Law of the United Nations. By HANS KELSEN. [London : Stevens & Sons, Ltd. 1951. 86 pp. 10s. 6d. (or £5 15s. with *The Law of the United Nations*).]

THIS forms a supplement, pages 909–994, to Professor Kelsen's monumental *Law of the United Nations*, a new impression of which now includes it. He has chosen four subjects for analysis : the organisation of collective self-defence; the action in Korea; the appointment of the Secretary General; and the ' United Action for Peace ' resolution adopted by the General Assembly at its Fifth Session.

Professor Kelsen says in the introduction that he is ' fully aware of the fact that the law of a community—national or international—and especially its constitution or constituent treaty, may be changed not only by formal amendments carried out in accordance with the procedure laid down for this purpose in the law itself, it may be modified also by its actual application based on an interpretation which, more or less consistent with the letter of the law, is not in conformity with the ascertainable intention of its authors. . . . The actions analysed in the Supplement are all attempts to find a way out of the impasse in which the unfortunate rule of unanimity has led the United Nations. Viewed retrospectively with regard to the Charter (the view necessarily presented in the Supplement) these actions may, in some of their aspects, be considered unconstitutional. But directing our view towards the future, we may see them as the first steps in the development of a new law of the United Nations '.

Professor Kelsen has no difficulty, with his great analytical virtuosity, in raising doubts about the legality of the action in Korea, the reappointment of the Secretary General and the adoption of the ' United Action for Peace ' resolution. In the action in Korea he points to the *ex post facto* character of the Security Council resolutions of June, 1950, and doubts whether it can be regarded as action of the United Nations for ' only if a Member acts in fulfilment of an obligation imposed upon it by the decision of an organ of the United Nations to the effect of performing a function of the Organisation, is the United Nations acting through the Member '. But how can this action be then ' a first step in the development of a new law of the United Nations ' ?

The strict constitutionality of the ' United Action for Peace ' resolution depends upon an interpretation of Articles 10 and 11 of the Chapter, which neutralises the effect of the requirement of

Article 11 (2) that ' any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion '. Professor Kelsen's construction of these Articles is not convincing. He says that the powers set out in Article 11 can only be additional to those set out in Article 10; but the sentence quoted from Article 11 (2) restricts the powers of the General Assembly ' set forth in Article 10 '; therefore Article 11 (4) taken literally is meaningless. But it might be read as meaning the *provisions* of Article 11 shall not restrict the scope of Article 10; then the sentence quoted from Article 11 (2), being a provision of that Article, must be treated ' as if it were not inserted in the Charter '; but since this is hardly possible, Article 10 must be interpreted as restricted by that provision, so that Article 11 (4) becomes non-applicable. This analysis is set out in some detail because it illustrates Professor Kelsen's method and its dangers. In the first place, it is against logic and common sense: there is no reason to assume that the powers set out in Article 11 must be additional, rather than an elaboration in the field of peace maintenance of the General Powers of the General Assembly. Again the sentence in Article 11 (2) does not restrict powers ' set forth in Article 10 ' but the powers set out in Article 11 (2) itself; it is not the expression of a power but of the limitation upon power. Article 11 (4), which strange though it may seem, means exactly what it says, has therefore no relation to the sentence in Article 11 (2). Article 11 (4) says simply that Article 11 does not ' prejudice the generality ' of Article 10, a familiar legal device, where particular powers follow general powers in an instrument. There are in fact no contradictions at all.

Secondly, analysis of this kind with its paradoxes and inversions tends to reduce the role of law in United Nations affairs to a tactical one; and Professor Kelsen's work, though theoretically fascinating, is likely to become in the hands of United Nations delegates—who after all interpret the Charter in the end—a handbook of debating points, in which something can be found to support any view on any question, with the authority of Kelsen's great name behind it.

Geschichte des Völkerrechts. By Georg Stadtmüller. [Hanover: Hermann Schroeder Verlag. 1951. 219 pp.]

Since Robert Ward's classic on *The Foundations and History of the Law of Nations in Europe* (1795), the history of international law tended to degenerate into a mere history of its doctrine. In the last decade, a marked—and necessary—change in emphasis back to the evolution of international law itself has been noticeable. International lawyers still show, however, a regrettable hesitation to master the relevant historical source material, and we owe to

historians some of the most significant recent studies in this unduly neglected field.

Again, it is a historian who has put international lawyers in his debt by attempting to write a comprehensive history of international law. The first volume of Professor Stadtmüller's *Geschichte des Völkerrechts* covers the whole of the history of international law from prehistoric times down to the Congress of Vienna. The second part of this work is intended to deal with the development of international law between 1815 and The Hague Peace Conferences.

In the compass of less than 200 pages of text, the author might have achieved more by limiting himself to the growth of the law of nations since the early Middle Ages. It may also be thought that much more monographic work on the practice of medieval and absolutist States would have to be done before an adequate history of even the European law of nations could be written. Perhaps from this point of view, Professor Stadtmüller's somewhat uncritical acceptance of the Roman Catholic doctrine of natural law and his over-estimation of the impact of the law of nature on international law—as distinct from its doctrine—are more of a handicap than a help to the historian of international law.

Yet when all this is said, it is only fair to add that the author has shown unusual academic courage in attempting this formidable task at all. Even in chapters which are obviously based on secondary authorities and remain regrettably sketchy, Professor Stadtmüller succeeds in making new material available to international lawyers who tend to be unaware of such valuable historical research as has already been carried out. Those who desire to mend their ways will find a helpful guide in the selective bibliographies on the various periods at the end of Professor Stadtmüller's book. Ten maps are a novel, but welcome, feature in this too short History of International Law, still unfortunately a lonely outpost in a desert that waits to be reclaimed.

G. Schwarzenberger.

The 'Double Tenth' Trial. War Crimes Trials. Vol. 8. Edited by Colin Sleeman and S. C. Silkin, Barristers-at-Law. (General Editor of series: The Rt. Hon. Sir David Maxwell Fyfe, K.C., M.P.) [London: William Hodge & Co., Ltd. 18s.]

It is lamentable that the phrase 'War Crimes Trials' signifies to the layman only the trial of the Nazis at Nuremberg with its concomitant debates on the validity of some of the charges; and that he is totally uninformed about the activities of the War Crimes Tribunals in the Far East is a charge to be laid at the door of the national press. The editors of the present volume in the *War*

Crimes Trials series note that the only reference to these trials to appear anywhere was a short notice in *The Times*. This new volume —Vol. 8 in the series—is the second on Japanese war crimes. The first—Vol. 3—reported the first war crimes trial to be held in the Far East and gained precedence in order of hearing over the subject-matter of the volume under review for political reasons, since it was concerned with charges of maltreatment by Capt. Gozawa Sadaichi and other officers, N.C.O.'s and men of the Japanese army of Indian prisoners-of-war, and was heard at the very time when a furore was caused in India by the instigation of the I.N.A. trials. The present volume deals with the trial in March, 1946, in Singapore, of Lt.-Col. Sumida Haruzo, the Commander of the Singapore branch of the Japanese Kempei Tai, and twenty members of his staff on charges of the ill-treatment and torture of some fifty-seven civilians, inmates of Changi Gaol in Singapore, as a result of which treatment fifteen perished.

The accused were charged with committing crimes against humanity, in that they arrested and treated civilians in a manner contrary to the laws and usages of war. The evidence tells of a dreadful chapter in the long story of hideous brutality and thuggery that characterised the behaviour of the dreaded Kempei Tai throughout Asia. It is perhaps unfortunate that for anyone who has had any contact with the Kempei Tai no account of their acts could seem other than true and real, nor does it help their reputation that they were feared not least by their own Japanese soldiers. The story of the events leading up to the arrest of these unfortunate citizens of occupied Singapore by the Kempei Tai, their ' examination for investigation purposes ', the inhuman beatings by ropes, iron bars, and sticks; immersion in water; shocks administered through electrodes applied to the sensitive parts of the body and other less subtle and more abominable inflictions are chronicled with a vividness that makes dreadful reading but is valuable as history.

The arrests and ill-treatment began in October, 1943, and lasted for nearly a year; those taken included women who were given no privacy and treated in exactly the same manner as the others, who were mainly Europeans, though there were also some Eurasians and Asiatics as well. Throughout 1943 acts of sabotage had been committed up and down Japanese-held Malaya culminating in the explosion by a daring raid-party from Australia under Captain Lyon of six Japanese oil tankers in Singapore harbour. This precipitated the Kempei Tai's embarking on their ' Number One Work '—Dai Ichi Kosaku—which was to be an attempt to implicate those arrested with the sabotage. That this work was doomed to failure as early investigations showed did not deter the Kempei Tai from proceeding with its atrocious mode of obtaining ' confessions ', and some of those arrested were subsequently sentenced to terms of imprisonment on trumped-up charges of sabotage and espionage

in the infamous 'Double Tenth' Trial. It was in the process of this 'Number One Work' that fifteen of those arrested lost their lives and the remainder of the fifty-seven were in a greater or lesser degree scarred or maimed for life.

Ever since the trial of Sir Peter Hagenbach in 1474, perhaps the first international war crime trial, for crimes against humanity, the defence most often relied upon by war criminals is that of *respondeat superior*. This defence failed to save Hagenbach as it has consistently failed to save modern war criminals, for whilst it is true in general that States alone are entities that enjoy full personality under international law, it is no less true that no individual can excuse his conduct before international law by pleading that he acted in obedience to superior orders. And as the editors point out, it is the vital purpose of these minor war crimes trials—minor in only the technical sense —to show not only that condemnation and sentence was by judicial and not political methods, but also that the rules of war apply no less to offending individuals than to States. The 'Double Tenth' Trial shows clearly that no soldier or civilian of a belligerent power can excuse his individual conduct by the plea that he was forced to act in obedience to the orders of his superiors. Some of the accused, including Lt.-Col. Sumida, were sentenced to death, some to terms of imprisonment and six were acquitted; none could fail to be impressed by the fairness of the trial and the excellence of the Japanese defending counsel. In war-time it is very easy to lose sight of the principle of individual responsibility; the publishers and editors of this volume are to be thanked for seeing to it in a well-presented, illustrated and valuable book that this is not to be forgotten.

Jerry L. Weinstein.

Projet d'un code européen de droit international privé; Bibliotheca Visseriana. Vol. 16. By Ernst Frankenstein. [Leyden. 1950.]

Professor Frankenstein's Draft European Code of Private International Law is the first post-war volume to be published in the Bibliotheca Visseriana. It is proof of the author's undimmed optimism and his belief in the eventual unification of private international law on a Continental European basis. Here, as, unfortunately, in other respects, this country is not yet considered to be a suitable partner in a great enterprise, and one is forced to agree with the author's introductory remark that 'the English lawyer's distrust of systems and systematic thought' cannot fail to arouse his opposition to a codified system of law, even in a limited field. For this reason the Code is confined to the countries of Continental legal tradition. It is a remarkable piece of work, and great credit is

due to Professor Frankenstein who has achieved alone what few lawyers would have dared to undertake even in co-operation with others.

The Code contains in more than 800 articles a complete exposition of the rules of private international law; a Draft Convention is annexed to it. The Code itself is divided into ten books : general provisions; natural persons, including marriage and divorce, guardianship and related matters; juridical persons, companies and the like; the law of property, succession, obligations, negotiable instruments, carriage by sea and air, civil procedure and bankruptcy. The scope of the work may seem ambitious, but by dealing with the subject as extensively as possible the author has been able to provide a broad basis for discussion. He points out in the introduction (at p. 7) that a draft code of this kind may either be confined to a few general observations, or be made to include as many detailed provisions as possible. By adopting the latter method the author has introduced more controversial matter than he would have done by presenting merely the framework of a code. On the other hand, he has facilitated the task of those who may eventually have to discuss his draft in detail and, where required, insert amendments to it.

The conflicting claims of nationality and domicile have been resolved in favour of the former. Art. 56, however, introduces as the pivot for all matters pertaining to status the new and eminently practical notion of the ' domicile statutaire ' (of which term the reviewer prefers not to attempt a translation). Art. 58 defines ' domicile statutaire ' as follows : ' A person who resides permanently in another country (of which he is not a national) there acquires a " domicile statutaire " if (a) he has established his residence there in accordance with art. 82 *et seq.*, and (b) has resided there in the circumstances set out in the said articles for a period of three years '. Art. 82 defines the term ' residence ', and arts. 68–77 provide for the issue of a certificate of ' domicile statutaire '. The most important provision is that contained in art. 73 which provides that the certificate of ' domicile statutaire ' is conclusive for all purposes. All doubt inherent in such terms as ' domicile ' and ' residence ' in the accepted sense is thereby removed, and the law applicable in matters of status ceases to be a source of speculation.

Similarly, the notion of ' ordre public ' is recognised as being a source of considerable uncertainty, and art. 12 accordingly provides that the application of foreign law on the ground of ' ordre public ' can be refused only in cases specifically set out in the Code. These cases can be found in the appropriate portion of the Code, as, *e.g.*, in arts. 313, 415 and others. It may be doubted, however, whether illegality according to local law, to which art. 415 makes reference, is a criterion any more certain than the general notion of ' ordre public '.

The Code contains elaborate provisions concerning ' change of

law': arts. 17–22. With regard to petitions for divorce it is suggested that, where a change of law has occurred in the course of the proceedings prior to a definitive judgment being given, the new law shall be applied, subject to certain exceptions. This seems an extraordinary innovation which, while it might in certain circumstances have advantages for one or other of the parties, would be highly inconvenient in practice.

With regard to the Law of Obligations, it is not surprising to find that the doctrine of the 'proper law of the contract' does not form part of the relevant provisions of the Code. The law of residence of the debtor at the time of the making of the contract is made applicable: art. 410. Full freedom of contract is, however, preserved by art. 418, subject to the parties not being permitted to select the law of a country with which the contract has no connection whatever.

The Law of Procedure is dealt with very fully in arts. 629–766. It is only too well known that problems of procedure frequently present greater difficulty in practice than problems of substantive law, and the author has rightly dealt with these problems at length. The ideal to be aimed at is full equality of suitors before the courts of all member States. Until, however, greater co-operation has been achieved in practice, it is doubtful whether it is wise to include in a draft code a provision that no security shall be required from litigants who have their 'domicile statutaire' in a foreign country: art. 636. Such a provision may cause grave inconvenience to a defendant who in the courts of his own country has been successful against a plaintiff domiciled abroad. Art. 724 may be quoted in support of the doubts expressed here; it provides that 'local law may refuse execution where it does not permit enforcement in relation to the subject-matter concerned or where it does not permit the method of enforcement contained in the judgment'. As long as different systems of law exist, the requirement of security cannot be dispensed with.

There are many other matters which are of profound interest, but space does not permit the reviewer to mention them all. A brief reference should, however, be made to the Draft Convention which is annexed to the Code. It provides for a 'Permanent Codification Commission' and a 'European Supreme Court'. The author suggests that this Court should exercise jurisdiction, at the instance of a Supreme Court of one of the member countries, in cases in which it intends to deviate from the judgment of the European Supreme Court or another municipal Supreme Court in matters pertaining to the application of the Code (or of the Convention); and at the instance of one of the parties, in cases in which the erroneous application or the non-application of any of the provisions of the Code (or of the Convention) is the only ground of appeal against the decision of a municipal court of appeal. The latter kind of appellate jurisdiction, *viz.*, at the instance of one of

the parties, would be almost bound to lead to undesirable rivalry between municipal courts and the European Supreme Court envisaged in art. 19 of the Code. The dividing line between the erroneous application of municipal law and the ' erroneous application of provisions of the Code ' may be very doubtful in many cases, and harm may well result from conflicting claims to jurisdiction by different courts.

Views may differ on many of the suggestions contained in Professor Frankenstein's work, but nobody can deny that the learned author has provided us with the wherewithal to exchange these views and to persuade those who have the power to do so to achieve greater uniformity of the law and thus to overcome some of the obstacles in the path of free intercourse between nations.

F. Honig.

Cases and Materials on International Law. By E. D. Dickinson. [Brooklyn : The Foundation Press. 1950. xxxix and 740 pp. $8.]

In the twenty years that have elapsed since *Dickinson* was first published much has happened in the field of international law, and it was unfortunate that as the years passed less reference was being made to this classic among casebooks. Now, at last, a new edition has appeared, and many of the more modern cases, particularly those decided in the United States, have been included.

This volume appears as one of the American *University Casebook Series* which means that it is not a casebook in the sense in which that term is used in this country, for it combines brief reports of judgments together with extracts from documents, from articles and from books, as well as editorial notes. Professor Dickinson nowhere indicates the hierarchy between these various sources, and the reader—presumably an unitiated student, for the book is intended for an ' introductory law school course of not more than two or three semester hours '—is left to decide for himself whether an extract from the pleadings, the judgment, a report of a drafting committee at San Francisco, Hyde or Oppenheim on international law, or Morgenthau on *Politics Among Nations*, or even from volume II of Churchill's *The Second World War* is to be given the greatest weight. The extract from Mr. Churchill relates very briefly to the Soviet absorption of the Baltic States. It is followed by the terse statement that ' the sequence of events in Estonia is set forth in some detail in *A/S Tallinna Laevauhisus* v. *Tallinn Co.* (1946) 175 L.T.R. 285 '. One might have expected in a casebook which considered it necessary to refer to these events to find the relevant extract from the case which mentioned the matter, particularly as the case is

referred to briefly again in connection with the non-recognition of the Soviet confiscatory decrees relating to Estonia.

The easiest way to criticise a casebook is to draw attention to the cases that are not included, but it should be borne in mind that every compiler is entitled to make his own selection. Nevertheless it comes as somewhat of a shock to find the *Palmas* and *Eastern Greenland* cases mentioned merely as further reading matter at the end of the *Clipperton Island* award. These two cases at least figure in the Table of Cases, but the same cannot be said of the *Wimbledon* and *Eastern Carelia* cases.

The compilation of any casebook, particularly one on international law, necessitates a great deal of compression of the texts of the actual judgments, and here, too, the compiler must be allowed to decide freely for himself what is of sufficient importance to be included. The only condition should be that the abbreviation is not so radical as to fail to give a true impression of the case to the reader. From this point of view it is a little difficult to see the value of the report at p. 581 under the heading ' Interpretation of Treaties ':

' (a) The International Forum

Georges Pinson Case. France and Mexico. Mixed Claims Commission, 1928. Annual Digest (1927–28) p. 426.'

' In view of the contradictory contentions of the Agents of the parties concerning the real scope of the main provisions of the French-Mexican Claims Convention (reparation of damages originating in the Mexican revolutions from 1910 to 1920), and of the difference of opinion between his fellow-Commissioners, the President formulated the following general rules of interpretation . . .

" (iv) Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way " '.

The report of the *Nuremberg Judgment* also leaves much to be desired. The book contains no reference to the Law of War. Instead, there is a section entitled ' Self-Help ', and the Trial of the Major War Criminals at Nuremberg appears in this chapter. Eight pages are devoted to the Trial, and these all relate to Crimes against Peace. Of these eight pages, one gives an extract from the case for the defence, three-and-a-half are devoted to Mr. Justice Jackson's opening statement, and the Tribunal's comments on the same subject are also given three-and-a-half pages. The exclusion of a section on the Law of War produces the strange situation of the *Corfu Channel Case* appearing next to *Nuremberg*. After mentioning that the majority considered warships were entitled to an innocent passage through the channel and that Albania was responsible for the explosions and the resulting damage, Professor Dickinson gives a three-and-a-half page extract

from the judgment affirming the illegality of Operation Retail, the British Government's mine-sweeping operation.

Regardless of criticism, it cannot be denied that Dickinson's *Cases* forms a handy compilation of comments on different aspects of international law, and a useful introduction for persons wishing to know what international law is all about. Although it is inadequate for English university students reading international law by the case method, it does enable them to read some of the more important and interesting American judgments like *Vermilya-Brown Co.* v. *Connell* (1948) 335 U.S. 377 which are not, otherwise, always readily available.

London. L. C. Green.

Constitution of the United Nations. By Alf Ross. [Ejnar Munksgaard, Copenhagen. 236 pp. Dan.kr. 21.]

Voting and Handling of Disputes in the Security Council. By E. Jimenez de Arechaga. [Carnegie Endowment for International Peace, New York. vi and 189 pp.]

Professor Ross divides his work into an introduction upon the origin and growth of the United Nations; three main sections concerned with its legal foundation, organisational structure, and functions; and a conclusion upon its general legal character. In the legal foundations he discovers a fault caused, he argues, by the failure of the U.S. Government as depository of ratifications of the Charter, to pass upon their validity when drawing up the protocol under Article 110; there is nothing in that Article to justify this view, but it is redeemed by an interesting discusssion of how far the Charter is both a treaty and a constitution. As to the structure and functions of the U.N., the book puts the Economic and Social Council and Trusteeship Council in a false perspective, largely because they are less interesting constitutionally than the Security Council and General Assembly, the discussion of them being slight and even superficial. In considering the Security Council, Professor Ross is misled by his somewhat formal approach into saying that the order of action under Articles 39–42 is immaterial; that the Four Power Statement at San Francisco on voting procedure is not binding upon the Council; and that the Council cannot intervene ex officio in a dispute or situation. He is rightly aware of the growing authority of the General Assembly in relation to the Security Council, but it is too early to call the Assembly the 'top omnipotent organ' (p. 51), and his reading of Article 11 (2) of the Charter which limits the powers of the Assembly vis-à-vis the Council is the only real obscurity in the book. Perhaps the best chapter is that which

attempts an analysis of the true function of the 'Purposes and Principles' of the United Nations set out in Articles 1 and 2 of the Charter; and his conclusion that there are 'traces—as the chemists say—of federation' in the United Nations is worth development. The book is lucid, often shrewd, and to the point, but its narrow framework seems to limit its role to that of a bare introduction to the U.N.

Professor Jimenez' book meets a great need. Indeed it is the first empirical study of the Charter at work. Mindful of the pitfalls and blind alleys of a priori interpretation of the Charter, and of the fact that it is the practice of U.N. bodies to interpret it for the most part themselves, he has gone to the Security Council records of proceedings for guidance on the meaning and use of Chapters VI and VII of the Charter, and has digested them in a form, replete with references, which will be of great value to all students of the U.N., and not least to U.N. delegations. He considers in turn the voting procedures in the Security Council; the submission of a dispute or situation; Article 34 and the power of investigation; methods of peaceful settlement; measures to avert or end hostilities; and action under Chapter VII of the Charter. The result is an admirable manual of Security Council practice.

Professor Jimenez is acutely aware of the fact that the Security Council is a political body which does not follow the logical and ordered processes of a court of law, or even a consistent course in interpreting and applying the Charter. It is characteristic that it works with rules of procedure, which are still provisional, ill constructed and obscure. By a happy comparison with early Roman law Professor Jimenez shows that the Security Council is praetor and not judex: 'Its primary functions . . . are those of a conciliator which brings the parties before a judge, rather than those of the judge' (p. 101). Faced by extensive problems without, and political tension within, the Council must, like Burke's rulers of empire 'get what obedience it can; it complies, too; it submits; it watches times'. Who, working from a legal interpretation of the Charter, could have foreseen that the Council would counter Arab attempts to overthrow the Palestine settlement by force only after weeks of hesitation and tortuous debate but would deal with the North Korean assault on the U.N. protected State of South Korea in a matter of hours? And even Professor Jimenez sometimes presses legal analysis too far: it is surely impossible to say that the Four Power statement on voting procedure is not binding on the non-permanent members of the Council (p. 12), so that a non-permanent member when President may disregard it. Either it is binding upon the Council as a whole, being an integral part of the San Francisco compact, or it is not binding at all. The Council practice, notwithstanding dissentient voices, shows that the first is a better view; whether it continues

to be binding when one member of the Council abuses or breaks the agreement embodied in the statement is of course another question.

Anglo-Amerikanisches Rechtswörterbuch (*Anglo-American Law Dictionary*). Part I : Englisch-Deutsch (English-German). By Robert F. Weissenstein, dr.jur., ll.b., j.s.d. New York. [Zurich: Schulthess & Co. A.G. 1950. vi and 199 pp. S.Frcs. 8.]

Whoever has had to deal with translations of legal documents or other legal papers from German into English or vice versa might have felt the need for a reliable Law Dictionary, concerned with legal terms in either language. Such a dictionary can be compiled in an appropriate manner by a lawyer only who is well conversant with law and practice in the Anglo-Saxon as well as in the German-speaking countries, and with the legal phraseology used by those two systems of law. Dr. Weissenstein who had practised as a well-known advocate in Vienna until the occupation of Austria by Germany is well suited for such a difficult job. As he points out in the Preface, his aim has been a twofold one : He intended to compose a specialised dictionary and at the same time to explain the meaning of the fundamental legal terms and legal institutions in the Anglo-American system of law. The learned author is certainly right when saying that the practising lawyer and in particular the translator requires not only philological but also juridical elucidation. Dr. Weissenstein, therefore, deals with the basic principles of law recognised in all common law countries in spite of differences in more or less important respects. Passages quoted literally are mainly taken from decisions of American courts delivered during the last four years and from U.S.A. legal literature.

To give an example : Continental law of succession is based on the principle of ' universal succession ' and of representation of the deceased by the (legal or testamentary) heir, which substantially differs from Anglo-American thinking. Dr. Weissenstein realises the difficulties which arise for the translator from this fundamental difference in the principles which govern the law of succession; also the procedure in succession cases is quite different on the Continent from that in this country and in the United States. I would refer in this respect to the headings: ' heir ', ' inheritance ', ' probate ', ' administration ', ' Executor '; our author quite rightly remarks—which is not seldom overlooked—that the position of an English ' Executor ' differs substantially from that of an ' Executor ' (Testamentsvollstrecker) in Austrian or German law. These few examples might suffice to show that Dr. Weissenstein's work will fill a gap in international legal literature.

It would be desirable that the second Part 'German-English' were published before long.

Paul Abel.

Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht. Vol. XIII, Nos. 1 and 2, February and September, 1950. Edited by Carl Bilfinger for the Max-Planck-Institut für aüslandisches öffentliches Recht und Völkerrecht.

Volume XIII of this journal is the first volume to be published since the end of the war, Vol. XII having appeared in 1944. International lawyers everywhere will welcome the re-appearance of this highly respected journal of international law. The first two issues fully justify the hopes and expectations of those who had come to appreciate the objectivity and scholarship of its contributors before the war. The contributions are of the same high order as were those of scholars who have since died and to whom the editors pay tribute in the opening pages of the new publication.

The journal is divided into three parts: articles on subjects of international law, reports and documents, and reviews of books and journals.

Dr. Yuen-li-Liang, the Director of the Division for the Development and Codification of International Law of the United Nations Secretariat, contributes an article on 'The Preparatory Work for the International Law Commission' (pp. 249–265). The article is a reprint of an address delivered by the author at the Harvard Law School in February, 1949, and a good deal of the work of the Commission has become known since. The report of the second session of the Commission has now been published, and certain priorities have been laid down for the codification of selected subjects of international law. Thus, the article, interesting though it is from the historical point of view, has largely been superseded by the subsequent achievements of the Commission.

The Principal Director of the United Nations Legal Department, A. H. Feller, surveys the achievements of the United Nations Organisation in an article entitled 'The United Nations—Appraisal and Forecast' (pp. 57–66). While acknowledging the relatively modest impact which the work of the Organisation has made on many pressing problems, he rightly points out that it has succeeded more than once in preventing conflagrations in all parts of the globe. Mr. Feller's contribution is proof of the need for increased publicity for the efforts of the United Nations in a variety of fields, so that the general public may realise the importance of the mere existence of a forum where controversial issues can be discussed and co-operative effort planned.

Dr. Günther Jaenicke contributes an article on 'The Admission of New Members to the United Nations Organisation' (pp. 291–380) which is far more comprehensive than its title indicates, in that it deals not only with the law relating to this controversial question, but also with the history of the disagreements between the Great Powers which caused the General Assembly to submit article 4 of the Charter to the International Court of Justice for two advisory opinions. The first of these opinions to which the author refers in great detail (pp. 330–351) was given on May 28, 1948; the Court decided by a majority of nine votes to six that the admission of members cannot be made conditional upon requirements other than those postulated in article 4 (1) of the Charter, and in particular cannot, as was suggested by the Soviet Union, be made subject to a condition that other States shall be admitted together with a State whose candidature is under consideration. The need for this advisory opinion arose from the desire of the Soviet Union to make the withdrawal of her veto to the admission of Italy and Finland and others dependent upon the simultaneous admission of Bulgaria, Hungary, Rumania and others.

The second opinion of the Court which was given on March 3, 1950, stated that the General Assembly is not entitled to effect the admission of a State to membership of the United Nations without a recommendation of the Security Council. This would appear to follow beyond doubt from the wording of article 4 (2) of the Charter. Two of the judges, however, Judges Alvarez (Chile) and Azevedo (Brazil), dissented from the majority view, Judge Alvarez holding that the Assembly is entitled to ignore a veto in the Security Council concerning admission to membership if it is of opinion that the veto has been abused, and Judge Azevedo going even further in holding that article 27 of the Charter does not apply to recommendations of the Security Council under article 4, on the ground that a 'recommendation' is not a 'decision' within the meaning of article 27 (3).

Although all the members of the Court were agreed that an abuse of the veto is inadmissible, it is doubtful whether the Court would consider itself competent to adjudicate upon the question of whether or not there has been such abuse in any given case. It is also doubtful whether a veto based on considerations other than those enumerated in article 4 (1) would ipso facto be regarded as an 'abuse'.

Neither of the two advisory opinions has removed the obstacles which still prevent the admission of a number of States. The author rightly points out (at p. 380) that in the last resort further developments will depend on whether the United Nations Organisation will continue to strive for universality or whether it will be forced to resign itself to the abandonment of this ideal and accept a permanent split between East and West.

An article by Professor Quincy Wright on 'International Law and International Organisation' (pp. 266–290) traces the development of international law from its two main pillars in the nineteenth century, the sovereignty of States and the balance of power, to its main pillar today, the United Nations Organisation. The article deals with fundamentals and seeks a way out of the present-day conflict between the law which seeks to regulate human affairs and the actual state of affairs which largely ignores that law. Any rule of conduct, in order to be 'law', must be generally acceptable, just, valid and effective (p. 282). The alternatives which, according to Professor Wright, the States of the world have to consider are an insecure balance of power supported by 'cold war', a world federation which enforces the law against individuals (and not only States), and a world State which will eventually be created by the sole survivor of an atomic war. If the ideal postulated by Professor Wright's third alternative can only be achieved as the result of an atomic war, few will disagree with his view that the second alternative is the most desirable. In spite of his realistic approach to the world situation today Professor Wright ends his article on a note of optimism although he goes no further than to describe the position of international law as 'not hopeless'.

Professor Bilfinger, whose article on 'Peace through the Balance of Power?' (pp. 27–56) traces the history of that institution, states at the outset that, in spite of all criticism directed against it, it is still the prerequisite and support of the idea of international order. This is undoubtedly true in fact as is evident from the grouping of Powers, large and small, around one or other of the two champions of diametrically opposed political ideologies. These, however, are questions of politics and not of law, and neither Professor Wright nor Professor Bilfinger would go as far as to maintain that the balance of power is still an institution of international law as it was in the nineteenth century.

The revised Geneva Conventions of August 12, 1949, form the subject of an article by Dr. Helmut Strebel (pp. 118–145). Their provisions are now well known to international lawyers, although they have not yet received sufficient attention in this country, having been made available in Cmd. 8033 more than a year after the publication of the official French text in Switzerland. Dr. Strebel's article contains a useful account of the history leading up to the Geneva Conference held in 1949 and critical comments on the innovations contained in the new Conventions, in particular those seeking to extend a minimum of protection to insurgents taking part in civil war, and to members of resistance movements in occupied territory.

Dr. R. Stödter's article on 'International Law and World Economy' (pp. 67–97) is a well-reasoned plea for the systematic study of international economic law ('Weltwirtschaftsrecht') as a

new branch of international law. Having traced the history of international commerce in an imperfect and chaotic system of international law from the seventeenth century to the present day, he poses the question of how to integrate world commerce into the present system of international law. The author regards this problem as one of particular importance to Germany and makes a number of eminently practical suggestions designed to further the study of a subject which has been sadly neglected in the past.

Professor M. Mouskhély, of Strasbourg University, in an article on 'Treaties and the Law in the French Constitutional System of 1946' (pp. 98–117), demonstrates convincingly that the new French Constitution has, by the provisions contained in article 26, resolved the eternal problem of monism as against dualism in favour of the former. Article 26 provides that 'les traités diplomatiques régulièrement ratifiés et publiés ont force de loi dans le cas même où ils seraient contraires à des lois internes françaises . . .'. The author deals with the manner in which the French constitution has solved the related problems of how to give external effect to treaties and international agreements, and of the relationship of treaty provisions to municipal law. In their desire to provide a complete exposition of the law affecting the relationship between international agreements and municipal law the makers of the French constitution felt that they should provide not only for the birth of treaties, but also for their death. Thus, article 28 provides that, as all treaties which have been ratified take precedence over municipal law, they cannot be abrogated except by what is called 'une dénonciation régulière, notifiée par voie diplomatique'. It is also provided that the abrogation of all treaties which, inter alia, modify municipal law, must, with the exception of commercial treaties, be authorised by the National Assembly. Complete as this code may appear, it does not deal with a number of questions, and in particular omits to consider the most important question of all, *viz.*, a conflict between international agreements and the constitution itself. The article is of great interest to international and constitutional lawyers alike and may encourage further study of this branch of the law on a comparative basis.

The documentary part of the journal, in addition to surveying the legal status of Germany and the various theories relating to it, which have been propounded by international lawyers of several countries (pp. 173–185), provides material for a study of the history leading up to the capitulation of Germany (pp. 393–410). The other documents, with the exception of those concerned with the work of the International Law Commission of the United Nations (pp. 381–393), relate to geographical areas outside Europe. In view of recent developments this is somewhat surprising, and it may be hoped that the next issue will redress the balance which is so heavily weighted in favour of the Middle East and the Far East. While it is true that documentation on the 'Origin of the

State of Israel' (pp. 146–172), on the 'Treaty of Friendship and Alliance between the Soviet Union and the People's Republic of China' (pp. 410–430) and the 'Establishment of the United States of Indonesia' (pp. 431–473) looms large in the political and strategic structure of the world today, it is regrettable that equal attention should not have been paid to Europe and the Atlantic area.

The reviews of books and periodicals dealing with international law and related subjects are comprehensive and written with great care. Some of these reviews do not, unfortunately, provide an up-to-date picture; in the case of the *British Year Book* the last volume to be reviewed is Vol. 2 (1945) and in the case of this journal Vol. 2 (1948). Similar considerations apply to the review of the *Year Book of World Affairs*. In view of the fact, however, that only two issues of the journal have so far been published since the end of the war, the time lag involved is probably entirely due to technical causes.

In conclusion it may be said that the journal is in every way a welcome addition to the literature on international law, and the first two issues leave no doubt that it will again take the place it occupied among leading journals of international law before the war.

F. Honig.

Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht. Vol. 13, Nos. 3 and 4 (March, 1951, June, 1951). Edited by Professor Carl Bilfinger for the Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht.

These two issues complete the first post-war volume of this Journal. The March issue contains an important contribution by Professor Bilfinger in which he examines the Schuman Plan within the framework of the wider problem of the political element in multi-lateral treaties of an organisational character. ('Of Political and Non-Political Law in Organisational Multi-Lateral Treaties, the Schuman Plan and World Organisation', pp. 615–659.) The Schuman Plan is considered side by side with the Brussels Sugar Convention of 1907, the Covenant of the League of Nations, and the World Postal Union. The object of Professor Bilfinger's study is not so much to give a comprehensive description of the Schuman Plan as to examine the question whether the political approach really deserves to be branded as an obstacle to peaceful co-operation between States. Even the Postal Union which is often regarded as the classic example of a non-political approach to world organisation is shown not to be free from political considerations. The political approach, far

from being an obstacle to peaceful development, often favours and furthers co-operation between States. The question whether the Schuman Plan is compatible with accepted principles of international law is answered affirmatively; the Plan provides for a collective organisation by means of a multi-lateral treaty,[2] although its wider aim is expressed to be the eventual federation of Europe.

Professor Scheuner's article on ' Trends of Natural Law in Present-Day International Law ' (pp. 556–614) is concerned with the re-emergence of natural law during the last thirty years. Positivism—which, incidentally, has not held undisputed sway in the field of international law even during the latter part of the nineteenth and the early part of the twentieth centuries—is yielding ground to principles of natural law in many fields. This trend is exemplified by the diminution of unfettered sovereignty, by the diminishing importance of the dualism between international and municipal law, and above all, by the gradual entry of the individual into the precincts of the Law of Nations. The author remarks that the personal responsibility of the individual under international law cannot be complete until such time as he is accorded the right by municipal law to disobey its provisions by invoking the higher duties imposed upon him by international law.

A problem of great practical importance is the subject of an article by Martin Domke (' German Assets in the United States of America, 1945–1950 ', pp. 537–555). It is concerned with German assets and their utilisation for the satisfaction of claims by American citizens, in particular under the provisions of the War Claims Act, 1948. Whether a peace treaty with Germany will eventually provide a satisfactory solution of this difficult problem is doubtful. Considerable hardship is likely to be caused in individual cases, not least owing to the fact that the power of the executive to adjudicate upon claims of this kind has been greatly extended at the expense of the jurisdiction of the courts.

The June issue of the Journal is largely concerned with Finland and the Far East, and it also contains an account of the last chapter of the developments which led to the establishment of the State of Israel. Of the two articles dealing with Finland, the first deals with the legal position of the Aaland Islands and the second with the general problem of State succession, with particular reference to the establishment of a free and independent Finland in 1917. Dr. Suontausta's article (pp. 741–752) traces the history of the demilitarisation of the islands from the Treaty of Paris to the Peace Treaty of 1917. The present status of the islands gives rise to certain doubts which, in view of the chequered history of Finland herself and the numerous treaties and conventions concerning the demilitarisation of the Aaland Islands, may persist for some time. The author also draws attention to the dual character of the

[2] The signatories are: Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

problem, *viz.*, that relating to demilitarisation and that relating to the rights claimed by the inhabitants of the islands. Professor Castrén's article on the 'Obligations of States Arising from the Dismemberment of Another State' (pp. 753–758) which deals with one of the incidents of the wider issue of State succession confines itself largely to the history of the establishment of Finnish independence in 1917. It contains little that is new, and it is somewhat limited in scope.

The most valuable and interesting contribution to this issue is that of Dr. Bünger who gives a well-documented account of the Constitutions of the Nationalist Government of China and of the Chinese People's Republic. In each case the author's translations from the original Chinese texts are preceded by introductions setting out the history and import of the more important provisions of the two Constitutions (pp. 758–785 and 808-858). That of the Nationalist Government of January 1, 1947, contains the most generous guarantees for the freedom of the individual in articles 7-22, but article 23 provides 'that the rights and liberties set out therein may be limited in so far as may be necessary to preserve the order of society or enhance the public weal'. The Constitution of the People's Republic, on the other hand, is more outspoken; it states expressly that only 'the people' enjoy full rights of citizenship. The others, who are described as 'subjects', while not enjoying these rights, are nevertheless liable to discharge the duties incumbent upon their privileged compatriots. The dictatorship of the proletariat is not enshrined as a constitutional principle, but four classes are clearly privileged by law: workers, peasants, 'small' capitalists and 'national' capitalists, the latter, it would appear, being those who are not feudal capitalists. The People's Republic has abandoned the traditional Chinese system of selecting civil servants by competitive examination, which is said to have served as a model for the recruitment of civil servants in this country (p. 779). Dr. Bünger's contribution contains a great deal more than is of profound interest, and he provides the most valuable information on a subject which is not easily accessible and which we can afford to ignore only at our peril.

In addition to the more important contributions which have been referred to, the Journal contains documents on the legal status of Germany—a subject which may yet prove to be of more than only academic interest; an account of constitutional developments in Czecho-Slovakia between the years 1940 and 1948; and extensive reviews of books and leading periodicals concerned with international law.

F. Honig.

BOOKS RECEIVED

(*Mention in this list does not preclude later review*)

Power Politics. G. Schwarzenberger. [Stevens & Sons, London. 1951. Second Revised Edition. £3 15s.]

The International Law of Recognition. T. C. Chen. Edited by L. C. Green. [Stevens & Sons, London. 1951. £4 4s.]

Yearbook on Human Rights for 1949. [United Nations. 1951. xvi and 421 pp. 37s. 6d.]

Human Rights as Legal Rights. Pieter N. Drost. [Sijthoff, Leiden. 1951. 272 pp. Fl. 18.50.]

Requête aux Nations Unies sur les violations des droits de l'homme. [L'Union pour la restauration et la défense du service public, Paris. 1951. 245 pp. 350 francs.]

International Treaties. Ann Thomas and A. J. Thomas. [Martinus Nijhoff, The Hague. 84 pp.]

International Law of the Sea. Higgins and Colombos. Second Edition by Colombos. [Longmans, London. 1951. xvi and 678 pp. 50s.]

The Problem of the Creation of a Permanent International Court. Antoine Sottile. [81 pp. 28s. 6d.]

Sovereignty and State-owned Commercial Entities. Paul Shepard. [Aberdeen Press, Inc., New York. 1951. vii and 155 pp.]

American-Swiss Private International Law. Arthur Nussbaum. [Columbia University, New York. 1951. 46 pp. $1.]

Handbuch des Besatzungsrechts. Institut für Besatzungsfragen, Tübingen. [J. C. B. Mohr, Tübingen. 1951. D.M. 20.25.]

Gerichtsfreie Hoheitsokte. Hans Schneider. [J. C. B. Mohr, Tübingen. 1951. 80 pp. D.M. 3.80.]

Annuaire de l'Institut de droit International, 1950. [Two volumes.]

Principles of Australian Administrative Law. W. Friedmann. [Melbourne University Press. 1950. 118 pp. 12s. 6d.]

Security and Freedom, the Great Challenge. [American Civil Liberties Union. 1951. 88 pp. 35c.]

Trademarks and the Law of Unfair Competition. T. A. Blanco-White. [Stevens & Sons, London. Second Edition. 74 pp. 5s.]

International Monetary Fund, Annual Report, 1951.

LIST OF DOCUMENTS

I. Agreements

Armed Forces

Convention between the United Kingdom Government and the Belgian Government regarding the Status of Belgian Forces in Germany. [Treaty Series 1951/40, December 23, 1949, Cmd. 8257.]

Exchange of Notes between the United Kingdom Government and the Danish Government regarding the Participation of a Danish Contingent in the Occupation of Germany. [Treaty Series 1951/60, December 13, 1950—May 15, 1951, Cmd. 8326.]

Exchange of Notes between the United Kingdom Government and the Norwegian Government further extending the Agreement of June 5, 1947, regarding the Participation of a Norwegian Brigade Group in the Occupation of Germany. [Treaty Series 1951/61, November 30, 1950—February 28, 1951, Cmd. 8327.]

Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty. [Misc. 1951/5, June 19, 1951, Cmd. 8279.]

Economic Co-operation

Exchange of Notes between the United Kingdom Government and the Government of the United States of America regarding Economic Co-operation. [Treaty Series 1951/48, May 25, 1951, Cmd. 8275.]

Eleventh Report on Operations under the Economic Co-operation Agreement between the United Kingdom Government and the United States of America. [Cmd. 8331.]

Finance

Exchange of Notes between the United Kingdom Government and the Egyptian Government extending and amending the Financial Agreement of March 31, 1949. [Treaty Series 1951/66, September 10, 1950, Cmd. 8335.]

Exchange of Notes between the United Kingdom Government and the Swiss Government further extending the provisions of the Anglo-Swiss Monetary Agreement of March 12, 1946. [Treaty Series 1951/56, June 9, 1951, Cmd. 8309.]

Sterling Releases Agreement between the United Kingdom Government and the Egyptian Government. [Treaty Series 1951/67, July 1, 1951, Cmd. 8336.]

Sterling Payments Agreement between the United Kingdom Government and the Egyptian Government. [Treaty Series 1951/68, July 1, 1951, Cmd. 8337.]

Taxation

Convention between the United Kingdom and the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income. [France 1951/3, December 14, 1950, Cmd. 8273.]

Supplementary Protocol between the United Kingdom and Burma to the Agreement of March 13, 1950, for the avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income. [Burma 1951/1, April 4, 1951, Cmd. 8263.]

Technical Assistance and Co-operation

Basic Agreement between certain Specialised Agencies of the United Nations and the Government of the United Kingdom for the Provision of Technical Assistance for Cyrenaica and Tripolitania. [Treaty Series 1951/64, December 15, 1950, Cmd. 8332.]

Agreement between the United Nations and the Food and Agriculture Organisation of the United Nations and the United Kingdom regarding Technical Assistance for Cyrenaica and Tripolitania. [Treaty Series 1951/65, December 15, 1950, Cmd. 8333.]

Agreement between the United Kingdom Government and the Government of the United States of America on Technical Assistance for Eritrea. [Treaty Series 1951/20, June 15, 1951, Cmd. 8292.]

Agreement between the Governments of the United Kingdom and the French Republic and the Government of the United States of America on Technical Assistance for Libya. [Treaty Series 1951/55, June 15, 1951, Cmd. 8298.]

Agreement between the World Health Organisation and the Government of the United Kingdom regarding Technical Assistance for Cyrenaica and Tripolitania. [Treaty Series 1951/70, July 2, 1951, Cmd. 8339.]

Agreement for Technical Co-operation between the United Kingdom Government and the Government of the United States of America. [Treaty Series 1951/73, July 13, 1951, Cmd. 8346.]

Trade and Industry

Exchange of Notes between the United Kingdom Government and the Government of Brazil regarding the continuance in force of Part II of the Trade and Payments Agreement of May 21, 1948. [Treaty Series 1951/54, April 2–13, 1951, Cmd. 8297.]

Protocol supplementing the Agreement on Trade and Payments between the United Kingdom Government and the Government of the Argentine Republic of June 27, 1949. [Treaty Series 1951/45, April 23, 1951, Cmd. 8268.]

Exchange of Notes between the United Kingdom Government and the Spanish Government further extending the Trade and Payments Agreement of June 23, 1948. [Treaty Series 1951/72, June 25, 1951, Cmd. 8344.]

Trade Agreement between the United Kingdom Government and the Government of Cuba. [Treaty Series 1951/71, August 10, 1951, Cmd. 8340.]

Exchange of Notes between the United Kingdom Government and the Government of Yugoslavia regarding a credit of £4,000,000 for Yugoslavia for the purchase of raw materials. [Treaty Series 1951/63, May 10, 1951, Cmd. 8313.]

Agreement between the French, United Kingdom and United States Governments regarding Industrial Controls in the French, United Kingdom and United States Areas of Occupation in Germany. [Treaty Series 1951/47, April 3, 1951, Cmd. 8272.]

Miscellaneous

Draft Peace Treaty with Japan. [Japan 1951/1, Cmd. 8300.]

Amendments to Draft Treaty of Peace with Japan. [Japan 1951/2, Cmd. 8316.]

Draft Treaty of Peace with Japan as amended August 13, 1951. [Japan 1951/3, Cmd. 8341.]

Treaty between the United Kingdom Government and the Government of Nepal. [Treaty Series 1951/46, October 30, 1950, Cmd. 8271.]

Convention between the United Kingdom and Luxembourg amending the Treaty of November 24, 1880, regarding Extradition. [Treaty Series 1951/59, May 29, 1939, Cmd. 8321.]

Consular Convention between the United Kingdom and the United States of America. [United States 1951/1, June 6, 1951, Cmd. 8289.]

North American Regional Broadcasting Agreement. [Misc. 1951/4, November 15, 1950, Cmd. 8315.]

II. International Organisations

United Nations

Report on the Proceedings of the Fifth Session of the General Assembly of the United Nations held at New York, September 19—December 15, 1950. [United Nations, 1951/3, Cmd. 8264.]

International Court of Justice

Case concerning Rights of Nationals of the United States of America in Morocco—Order of June 25, 1951.

Anglo-Iranian Oil Company Case—Request for the Indication of Interim Measures of Protection—Order of July 5, 1951.

Council of Europe

Amendments to the Statute of the Council of Europe. [Treaty Series 1951/53, Cmd. 8293.]

International Civil Aviation Organisation

North Atlantic Ocean Weather Stations Agreement. [Treaty Series 1951/69, May 12, 1949, Cmd. 8334.]

International Law Commission

Second Report on the High Seas. [A/CN. 4/42, April 10, 1951.]

Second Report on a Draft Code of Offences against the Peace and Security of Mankind. [A/CN. 4/44, April 12, 1951.]

Second Report on Arbitration Procedure. [A/CN. 4/46, May 28, 1951.]

Report of the International Law Commission Covering its Third Session, May 16—July 27, 1951. [A/CN. 4/48, July 30, 1951.]

III. Statutory Instruments

The Aliens Order, 1951. [No. 966, May 31.]

The Foreign Service Fees Order in Council, 1951. [No. 971, May 31.]

The Foreign Service Fees Regulations. [No. 1020, May 29.]

The Exchange Control (Import and Export) (No. 2) Order, 1951. [No. 955, June 4.]

The Foreign Compensation (Czechoslovakia) (Amendment) Order in Council, 1951. [No. 1166, June 29.]

The Northern Rhodesia Order in Council, 1951. [No. 1167, June 29.]

The Northern Rhodesia (Native Reserves) Amendment Order in Council, 1951. [No. 1168, June 29.]

The Gambia (Legislative Council) (Amendment) Order in Council, 1951. [No. 1169, June 29.]

The Luxembourg (Extradition) Order in Council, 1951. [No. 1170, June 29.]

The Luxembourg (Extradition) (Australia) Order in Council, 1951. [No. 1171, June 29.]

The Nigeria (Constitution) Order in Council, 1951. [No. 1172, June 29.]

The Supplies and Services (Defence Purposes) (Colonies, etc.) Order in Council, 1951. [No. 1241, July 11.]

The Sweden (Extradition) (Termination) Order in Council, 1951. [No. 1384, August 1.]

The Carriage by Air (Parties to Convention) Order, 1951. [No. 1386, August 1.]

The Double Taxation Relief (Taxes on Income) (France) Order, 1951. [No. 1388, August 1.]

The Patents, etc. (Egypt) (Convention) Order, 1951. [No. 1389, August 1.]

The Dominica (Legislative Council) Order in Council, 1951. [No. 1392, August 1.]

The Grenada (Legislative Council) Order in Council, 1951. [No. 1393, August 1.]

The Saint Vincent (Legislative Council) Order in Council, 1951. [No. 1394, August 1.]

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DICEY: AN AMERICAN COMMENTARY *H. E. Yntema* 1

THE INTERPRETATION OF WAR UNDER PRESENT INTERNATIONAL LAW *R. W. Tucker* 11

NATIONALITY AND DOMICILE IN SWEDISH PRIVATE INTERNATIONAL LAW *Folke Schmidt* 39

A FOOTNOTE TO PROFESSOR SCHMIDT'S ARTICLE *G. C. Cheshire* 52

GERMAN ENEMY PROPERTY—III (concluded) *E. J. Cohn* 60

THE INTERNATIONAL COURT'S ADVISORY OPINION ON THE INTERNATIONAL STATUS OF SOUTH-WEST AFRICA *E. Kahn* 78

THE LEX SITUS AND HERITABLE (OR REAL) PROPERTY *Alex. Donaldson* 100

NOTES

Private International Law in Ethiopia 111

The International Law Association Conference at Copenhagen, 1950 115

A Soviet Approach to Private International Law 120

BOOK REVIEWS

Lauterpacht: International Law and Human Rights 126

Nussbaum: Money in the Law, National and International 129

Law Reports of Trials of War Criminals, Vols. 14 and 15 131

Wolff: Private International Law (2nd ed.) 135

Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States 140

Schmitthoff: The Export Trade (2nd ed.) 141

Mezger and Maury: Matrimonios Españoles ante Tribunales Franceses 143

Goldschmidt: Sistema y Filosofia del Derecho Internacional Privado 147

Gabaglia: Guerra e Direito Internacional 148

Nordisk Tidsskrift 149

Makarov: Internationales Privatrecht und Rechtsvergleichung 149

Bulletin de Droit Tchecoslovaque 150

Burdeau: Traité de Science Politique, Vol. 3 150

Carman: Soviet Imperialism 151

Tappan: Juvenile Delinquency 152

LIST OF DOCUMENTS 155

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Ryde, W. C.—The Law and Practice of Rating. 9th ed.	4 11 6
Scott, Cooper and **Seuffert.** National Health Service Acts, 1946 and 1949.	2 16 3
Shaw and **Townsend.** Corporation of Certified Secretaries Manual on the Law of Meetings. 2nd ed. (revised)	15 10
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